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IN THE

Supreme Court of the United States

October Term, 1969

No. 1347

FLOYD BLOSS; KENT COUNTY THEATER CORPORATION, A Michigan Corporation; Their Officers, Agents and Employees.
Petitioners.

v.

STEVEN L. DYKEMA,
in his capacity as City Attorney,
City of Grand Rapids, Michigan,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court for the State of Michigan

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March, 1970

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2. *Michigan Statutes Annotated, 27A.2938 et seq.* are, as written, repugnant to the substantive due process provisions of the *Fifth* and *Fourteenth*

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Amendments to the *Constitution of the United States* and the freedoms guaranteed under the *First Amendment* thereto because they permit the deprivation of liberty and/or property interests in the exercise of *First Amendment* rights by unreasonable, arbitrary and capricious means by law enforcement officials of the State of Michigan without a showing of a real and substantial relationship to any state's subordinating interest which is compelling to justify state action limiting *First Amendment* freedoms in that the same permits *ex parte* findings and conclusions of law and the issuance of *ex parte* injunctions restricting and inhibiting the exercise of *First Amendment* freedoms 19

3. *Michigan Statutes Annotated 27A.2938 et seq.* are, as written, unconstitutionally overbroad to authorize an *ex parte* injunction precluding the acquisition or possession as well as the sale or further sale or distribution of *First Amendment* materials which contain an article or instrument which is purportedly obscene, lewd, lascivious, filthy, indecent or disgusting or which purports to be for an indecent or immoral use or purpose and is thereby repugnant to the *First, Fourth, Fifth*, and *Fourteenth Amendments* to the *Constitution of the United States* 24

4. *Michigan Statutes Annotated 27A.2938 et seq.* are, as construed and applied to the case at bar, unconstitutional in permitting the *ex parte* declaration of obscenity of the materials declaring that they are not entitled to constitutional protection and the *ex parte* issuance of an Injunction

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prohibiting the sale, distribution, acquisition, and possession by Petitioners, their officers, agents, and employees of presumptively protected *First Amendment* materials and abridges the exercise of freedom of speech and press guaranteed under the *First* and *Fourteenth Amendments* to the *Constitution of the United States* 27

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IN THE

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No. ------

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Petitioners.

v.

STEVEN L. DYKEMA,
in his capacity as City Attorney,
City of Grand Rapids, Michigan.

Respondent.

Petition for a Writ of Certiorari to the Supreme Court for the State of Michigan

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court for the State of Michigan entered in the above entitled case on December 23, 1969.

OPINIONS BELOW

Petitioners, Floyd Bloss and Kent County Theater Corporation and their officers, agents and employees were named as Defendants in a Civil Complaint and Summons filed by Steven Dykema, in his capacity as City Attorney for the City of Grand Rapids, Michigan on March 7, 1968, in the Circuit Court for Kent County, Michigan, under the provisions of *Michigan Statutes Annotated 27A.2938* seeking *inter alia* to enjoin them from the further sale and possession of magazines entitled, "Cover Girl;" "Pinned;" "Missie;" and "Jaybird Photographer No. 9." On the same date, His Honor, John T. Letts, Circuit Judge, issued an *ex parte* Injunction and Order to Show Cause restraining them "from the sale, distribution, acquisition or possession of . . ." the named publications. A copy of the Complaint, *ex parte* Injunction, Summons and Order to Show Cause were directed to be served on the named Defendants. Trial was held in the Circuit Court for the County of Kent before His Honor, John T. Letts, sitting without a jury, on March 15-16, 1968 as Case No. 7224. Petitioners filed an Answer to the Bill of Complaint on March 12, 1968. Respondent filed an Amended Complaint on March 13, 1968 and a Second Amended Complaint was served on Petitioners at trial on March 15, 1968. Each of the amendments entered new publications citing and alleging them to be obscene. Thereafter, His Honor, Judge Letts made a finding by written opinion that the publications and each and every one of them were obscene as a matter of law. Pursuant to this finding on March 18, 1968, His Honor, Judge Letts issued an Order directing that the named Defendants, their agents, attorneys, employees, officers and servants, persons in active concert with them, or those who receive actual notice were permanently restrained and enjoined from the further sale, distribution, acquisition or possession for sale, display or distribution of the publications including additional copies thereof. It was further ordered

that all copies of the publications be surrendered to the Sheriff of Kent County and that the said Sheriff was ordered to seize and destroy the publications. A copy of the Complaint and a copy of the Summons and a copy of the *ex parte* Injunction, Notice of Hearing and Show Cause Order is annexed hereto as Appendix "A". The Answer by Petitioners is annexed hereto as Appendix "B". The Amended Complaint and the Second Amended Complaint is annexed hereto as Appendix "C". The Opinion of His Honor, Judge Letts together with the Orders issued by him pursuant to it are annexed hereto as Appendix "D".

The Petitioners appealed the decision of Judge Letts, which case was docketed as No. 5635 in the Court of Appeals, Division 3, for the State of Michigan. His Honor, Judge Holbrook, gave a written opinion of the Court on May 9, 1969, wherein the Circuit Court decision was affirmed in part and reversed upon those publications named in the Amended Complaint. His Honor, Judge Danhoff issued a concurring opinion on all decisive points. His Honor, Judge Levin concurred in the reversal of the decision upon magazines named in the Amended Complaint and dissented from the two-judge majority as to the other named publications both in the original complaint and the Second Amended Complaint and would reverse entirely and vacate the injunction. Copies of the separate opinions are annexed hereto as Appendix "E".

The Petitioners made application to the Supreme Court for the State of Michigan for leave to appeal the decision of the Court of Appeals affirming the decision and order of the Circuit Court. The Application for Leave to Appeal docketed No. 52498 was filed on May 28, 1969. On order of the Supreme Court of the State of Michigan, the application for leave to appeal was denied on December 23, 1969, stating that there was not sufficient persuasion by appellants of a

meritorious basis for appeal or that the decision of the Court of Appeals was clearly erroneous. A copy of the Application to Appeal and order denying leave to appeal is annexed hereto as Appendix "F".

JURISDICTION

The judgment of the Circuit Court for Kent County was entered against Petitioners on March 18, 1968. The Judgment of the Court of Appeals, Division 3, was entered on May 9, 1969 reversing in part and affirming in part the judgment of the Circuit Court and sustaining the ordered destruction of the publications in the affirmance together with the Permanent Injunction also being affirmed. The application for leave to appeal to the Supreme Court for the State of Michigan was ordered denied on December 23, 1969, citing a lack of persuasion by appellants of a meritorious basis for appeal or that the decision of the Court of Appeals was not shown to be clearly erroneous, and the judgment was thus final. *Chicago G.P.R. Company v. Basham, 249 U.S. 164.* The jurisdiction of this Court is invoked under *28 U.S.C.A. Section 1257 (3).*

QUESTIONS PRESENTED

1. Whether Michigan Statutes Annotated, 27A.2938 et seq. are, as written, void for vagueness and impermissible overbreadth in the area of *First Amendment* freedoms because the said provisions are susceptible of sweeping and improper application by law enforcement officials and have a chilling and inhibiting effect on the exercise of the federal constitutional rights of citizens of the State of Michigan and of the United States to disseminate and receive *First Amendment* materials in that there are no standards or guidelines set forth in the statute which due process demands

to assure non-obscene materials the constitutional protection to which they are entitled for citizens to possess, distribute, acquire, sell, receive and/or purchase *First Amendment* materials and are thereby repugnant to the free speech and press and due process provisions of the *First, Fourth, Fifth, and Fourteenth Amendments* to the *Constitution of the United States.*

2. Whether *Michigan Statutes Annotated, 27A.2938 et seq.* are, as written, repugnant to the substantive due process provisions of the *Fifth* and *Fourteenth Amendments* to the *Constitution of the United States* and the freedoms guaranteed under the *First Amendment* thereto because they permit the deprivation of liberty and/or property interests in the exercise of *First Amendment* rights by unreasonable, arbitrary and capricious means by law enforcement officials of the State of Michigan without a showing of a real and substantial relationship to any state's subordinating interest which is compelling to justify state action limiting *First Amendment* freedoms in that the same permits *ex parte* findings and conclusions of law and the issuance of *ex parte* injunctions restricting and inhibiting the exercise of *First Amendment* freedoms.

3. Whether *Michigan Statutes Annotated 27A.2938* et seq. are, as written, unconstitutionally overbroad to authorize an *ex parte* injunction precluding the acquisition or possession as well as the sale or further sale or distribution of *First Amendment* materials which contain an article or instrument which is purportedly obscene, lewd, lascivious, filthy, indecent or disgusting or which purports to be for an indecent or immoral use or purpose and is thereby repugnant to the *First, Fourth, Fifth,* and *Fourteenth Amendments* to the *Constitution of the United States.*

4. Whether *Michigan Statutes Annotated 27A.2938 et seq.* are, as construed and applied to the case at bar, unconstitutional in permitting the *ex parte* declaration of obscenity of the materials declaring that they are not entitled to constitutional protection and the *ex parte* issuance of an Injunction prohibiting the sale, distribution, acquisition, and possession by Petitioners, their officers, agents, and employees of presumptively protected *First Amendment* materials and abridges the exercise of freedom of speech and press guaranteed under the *First* and *Fourteenth Amendments* to the *Constitution of the United States*.

5. Whether the presumptively protected *First Amendment* materials heretofore adjudged obscene and under judicial order for destruction and which were subjected to a Preliminary *ex parte* Injunction and Permanent Injunction preventing their dissemination are obscene in the constitutional sense, absent any evidence of the sort of pandering which this Court deemed significant in *Ginzburg v. U.S.*, *383 U.S.* 463, and in which there is no claim asserted that the statute reflects a specific and limited state concern for minors or absent any evidence or suggestion of an assault upon individual privacy by publication in a manner so obstrusive as to make it impossible for an unwilling individual to avoid confrontation with the materials.

6. Whether the state, under *Michigan Statutes Annotated, 27A.2938*, et seq. in proscribing materials as obscene, must affirmatively produce evidence that a) the presumptively protected materials have a dominant theme that taken as a whole appeals to the prurient interest in sex; b) the matter is patently offensive because it affronts contemporary community standards relating to the description of sexual matters; and c) the materials are *utterly* without redeeming social value, and that the three elements have coalesced before the materials may constitutionally be suppressed and without

the protection of the *First* and *Fourteenth Amendments* to the *Constitution of the United States*.

7. If the statute, *Michigan Statutes Annotated 27A.2938*, is found by the court to be constitutional upon its face and as applied in the premises, and assuming for the sake of argument that the materials herein meet those tests for obscenity variously prescribed by this Court, can the materials constitutionally be suppressed absent any evidence that the statute reflects a specific and limited state concern for juveniles and absent any evidence the materials are disseminated in such a manner as to offend the sensibilities or privacy of an individual wishing to avoid confrontation with them and absent evidence that the materials are not being disseminated only to the willing adult public.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the *First*, *Fifth* and *Fourteenth Amendments* to the *Constitution of the United States* and the provisions of *Michigan Statutes Annotated 27A.2938* et seq. are set forth in Appendix "G" hereto.

STATEMENT OF THE CASE

On March 7, 1968, Petitioners Floyd Bloss and the Kent County Theater Corporation and their officers, agents and employees were named as Defendants in a civil complaint docketed as No. 7224, filed by Respondent Steven Dykema in his capacity as City Attorney for the City of Grand Rapids, Michigan, naming four specific publications alleging these publications to be obscene as determined by the Respondent and requesting the Circuit Court of Kent County, Michigan take certain actions pursuant to *Michigan Statutes Annotated*

27A.2938. The prayer for relief requested a preliminary finding of obscenity and an Injunction restraining the Petitioners and to "be temporarily restrained and enjoined from the further sale, distribution, acquisition, or possession of . . ." the publications pending a hearing and further a hearing to show cause and/or trial on the merits. The Respondent also requested that following a hearing, the publications be declared obscene and a permanent injunction follow forbidding any further "sale, distribution, acquisition or possession" of the publications and that the publications and all copies thereof be seized and destroyed. His Honor, Judge John Letts, based solely upon the complaint, an affidavit of a police officer and the attached magazines, the same date issued an *ex parte* Injunction restraining and enjoining Petitioners "from the sale, distribution, acquisition or possession of . . ." the named publications. A copy of the Complaint, Preliminary Injunction and Order to Show Cause and a Summons for trial set for March 8, 1968 were directed to be served upon Petitioners, ordering Petitioners to appear and show cause why the Injunction should not continue. The Respondent accompanied by police officers served the Summons, Complaint, Injunction and Order on Petitioner Bloss's agent at the bookstore on the evening of March 7, 1968. During the service of this process at the business establishment Respondent and the accompanying police officer entered the premises without paying the entrance fee of $1.00. Respondent observed numerous books displayed therein and contacted Captain Pierce of the Grand Rapids Police Department requesting he then contact the Prosecuting Attorney for a search warrant. Another police officer arrived and the materials were examined without a search and seizure warrant. Respondent Dykema chose to seize a large number of the magazines that he selected after the examination. There was at the time no search and seizure or arrest warrant in existence nor was any arrest made with the seizure.

On March 12, 1968 Petitioners filed an answer to the Complaint denying the publications were obscene; denying that the Kent County Theater Corporation was engaged in the dissemination of publications; alleging the seized materials were protected expression under the *First* and *Fourteenth Amendments*; and that the statute under which the action was brought was unconstitutionally vague and unconstitutionally overbroad citing *inter alia* that there were insufficient standards for the definition and determination of obscenity, that the burden of vindication for *First Amendment* freedoms rested upon who may seek to exercise these rights, the statute created a position of censor without any legal or constitutional qualifications and that the statute created an unconstitutional "prior restraint" upon the exercise of *First Amendment* freedoms.

On March 13, 1968 Respondent Dykema filed an Amended Complaint in the same case requesting the multiple magazines seized during the service of process be subjected to the same proscription as those publications in the original complaint.

On March 15, 1968 at the trial proceedings a Second Amended Complaint was filed by Respondent Dykema requesting the same relief for nine (9) additional magazines purchased on March 7, 1968 at the time of seizure of the materials contained in the Amended Complaint which was purchased by police officers and arranged for by Respondent Dykema.

Trial was held on March 15-16, 1968 before His Honor, Judge John T. Letts, Circuit Judge for Kent County, at which time he found the publications properly before the Court; that the statute was constitutional; and thereafter ordered the materials and all copies thereof seized and destroyed by the

Sheriff. He issued a Permanent Injunction against Petitioners "from the further sale, distribution, acquisition or possession for sale, display or distribution" of the publications including additional copies thereof. An order was entered requiring Petitioners to surrender all copies of the materials to the sheriff for destruction.

The testimony established that Petitioner Bloss, his agents, servants and employees are engaged in the dissemination of publications in an adults only book store which requires an admission fee prior to entrance and that only the general outlines of books may be seen from the exterior. No evidence was adduced by the moving party that Petitioners sold or offered for sale to a minor or an unwilling purchaser nor thrust upon a person wishing to avoid confrontation with the materials. An advertisement on the screen of the Kent County Theater Corporation in an adults only theater advised the audience that they should visit the Capri Book Store and Library a block or two south of the theater.

There was no evidence from any competent witness bearing upon the materials appeal to the prurient interest. The only evidence produced bearing upon the issue of the contemporary community standards was given by Respondent utilizing the "local community" test as was the issue of any lack of "redeeming social value." Similarly there was no evidence produced that the three elements were present and had coalesced.

Typical of the conclusory assertions of Respondent Dykema in the application of the tests for obscenity, is the statements

> "(The Witness) felt that they far exceeded the customary limits of candor in this community." R-155 and in response to the "community"

"(The Witness) I think it's the local community."
R-180

An appeal by Respondents was taken to the Court of Appeals, Division 3, for the State of Michigan and docketed as No. 5635. The Court of Appeals reported out in a written opinion on May 9, 1969 constituting a two to one majority that the materials were obscene as found in the original complaint and the Second Amended Complaint but reversing and dismissing the judgment of the lower court as to the materials in the Amended Complaint for having been illegally seized.

An application for leave to Appeal to the Supreme Court for the State of Michigan was filed by Respondents and docketed as No. 52498. On Order from the Supreme Court of the State of Michigan dated December 23, 1969, the application for leave to appeal the decision of the Court of Appeals, Division 3, was denied.

HOW FEDERAL QUESTIONS ARE PRESENTED

On behalf of Petitioners, the following affirmative defenses were raised by Answer in the Circuit Court for Kent County; a) That the publications were not obscene and constituted protected expression under the *First* and *Fourteenth Amendments* to the federal constitution; b) That the Michigan statute under which the action was commenced was unconstitutionally vague and overbroad; c) That the Michigan Statute was unconstitutional for failure to set forth sufficient standards in the definition of obscenity; d) that the burden of vindication for *First Amendment* freedoms rested upon the person seeking to exercise these rights; and, e) That the statute constituted an invalid and unconstitutional "prior restraint" upon the exercise of *First Amendment* freedoms. The defenses were rejected by Judge Letts at page 14 of his

opinion at which time he upheld the *ex parte* injunctive procedures and all other provisions of the statute. A timely notice of Appeal to the Court of Appeals was entered from the Judgment and Injunction entered in the Circuit Court for Kent County. The record of all pleadings and the lower court opinion and Judgment was filed in the proceedings. The Court of Appeals reported out in a written opinion finding that the Petitioners could not contest the proceeding under the statute since a similar statute was found constitutional by the Supreme Court. It was further found that the materials were proscribable and not entitled to *First Amendment* protection.

An application for leave to appeal from the Court of Appeals to the Michigan Supreme Court was timely filed on May 28, 1969. The application preserved the federal constitutional questions for review by the Supreme Court of the State of Michigan alleging *inter alia* that:

> "A) The subject matter of the litigation involved herein involves rights guaranteed under the *First* and *Fourteenth Amendments* of the *United States Constitution*, and *Article One, Section Five*, of the *Michigan Constitution* of 1963, and more particularly rights of free speech and expression.
>
> "B) That the decision of the Court of Appeals, Third Division, is clearly erroneous and that as a result thereof material injury will be suffered by this Appellant.
>
> "C) That the decision of the Court of Appeals is contrary to the interpretative decisions of the United States Supreme Court, more particularly, *Redrup v. New York*, 386 U.S. 767, 87 S. Ct. 1414, 18 L. ed 2d 215 (1967); *Central Magazine Sales Limited v. United States*, 88 S. Ct. 235, 389 U.S. 50 (1967); *and Potomac News Company v. United States*, 88 S. Ct. 233 (1967); reversing 373 Fed. 2d 635 (1968).

"D) That the decision of the Court of Appeals is contrary to two other unanimous decisions of the Court of Appeals, State of Michigan, First Division, to-wit: the case of *People v. Zerelli*, 14 Mich. App. 513 (1969) and *Olson v. Doerfler and Royal News*, 14 Mich. App. 428 (1969).

"All as more fully appear in the Statement of Facts and other documents attached hereto and made a part hereof including, though not limited to the decision of the Court of Appeals."

The Supreme Court for the State of Michigan without opinion entered an Order on December 23, 1969 stating that the Petitioners had not set forth sufficient persuasion for a meritorious basis for appeal or that the decision of the Court of Appeals was clearly erroneous.

REASONS FOR GRANTING THE WRIT

I. *MICHIGAN STATUTES ANNOTATED, 27A.2938 et seq.* are, as written, void for vagueness and impermissible overbreadth in the area of First Amendment freedoms because the said provisions are susceptible of sweeping and improper application by law enforcement officials and have a chilling and inhibiting effect on the exercise of the federal constitutional rights of citizens of the State of Michigan and of the United States to disseminate and receive *First Amendment* materials in that there are no standards or guidelines set forth in the statute which Due Process demands to assure non-obscene materials the constitutional protection to which they are entitled for citizens to possess, distribute, acquire, sell, receive and/or purchase First Amendment materials and is thereby repugnant to the free speech and press and Due Process provisions of the *First, Fourth, Fifth* and *Fourteenth Amendments* to the *Constitution of the United States.*

The statute provides under *Sub-Section (1)* for the chief executive or legal office of municipalities or the prosecuting attorney of a county to institute and maintain an action to enjoin and prevent *inter alia* the acquisition, possession and distribution of presumptively protected *First Amendment* materials which are "obscene, lewd, lascivious, filthy, indecent or disgusting or which contains an article . . . of indecent or immoral use or purports to be for indecent or immoral use or purpose."

There are no definitions of any of the terms including that of obscenity. The sub-section is all encompassing including the mere possession or acquisition of publications containing an article of immoral use or purpose. This Court has repeatedly condemned such overbroad and overly vague statutes.

It is elementary that in the area of *First Amendment* Freedoms, an overbroad and vague statute is repugnant to the constitutional provisions guaranteeing those freedoms.

A statute is void for vagueness whenever a person of ordinary intelligence must guess at its meaning and differ as to its application, *Oertel Co. v. Glenn* (D.C. Ky.) 13 F.Supp. 651, affirmed, 97 F.2d 495; *Anderson v. Burnquist* (Minn.), 11 N.W. 2d 776; *State v. Hoebel* (Wis.), 41 N.W. 2d 865, and where the terms of the statute are so vague as to convey no definite meaning to those whose duty it is to execute it are likewise invalid, *State v. Morrison*, (N.C.), 185 S.E. 674; *People ex rel. Duffy v. Hurley*, 85 N.E. 2d 26.

The United States Supreme Court has at various times enunciated the need of removing vagueness from the penal or confiscation statutes in the area of *First Amendment* freedoms. In the case styled *Marcus v. Property Search Warrants*, 367 U.S. 717:

"The warrants gave the broadest discretion to the executing officers; they merely repeated the language of the statute and the complaints, specified no publications, and left to the individual judgment of each of the many police officers involved the selection of such magazines as in his view constituted 'obscene . . . publications.' 'We think this case demonstrably falls within the compass of those decisions of the Court which hold that '. . . a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

. . .

"The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution. As we said in Smith v. California, '. . . stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.' "

Then in *Bantam Books v. Sullivan,* 372 U.S. 58:

"Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards, Smith v. California, 361 U.S. 147, 4 L.ed 2d 205, 80 S. Ct. 215; Marcus v. Search Warrant of Property (US), supra, is therefore but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks. See, e.g., Thornhill v. Alabama, 310 U.S. 8, 84 L. ed. 1093, 60 S. Ct. 736; Winters v. New York, 333 U.S. 507, 92 L. ed 840, 68 S. Ct. 665; NAACP v. Button, 371 U.S. 415, 9 L. ed 2d 405, 83

S. Ct. 328. (T)he line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools . . ."

and in *Baggett v. Bullitt*, 377 U.S. 360:

"As in *Cramp v. Board of Public Instruction*, (Emphasis supplied), '(t)he vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution.' 368 U.S. 278, 287, 7 L. ed. 2d 285, 292, 82 S. Ct. 275. We are dealing with indefinite statutes whose terms, even narrowly construed, abut upon sensitive areas of basic First Amendment freedoms."

This Court has dealt directly with statutes regulating *First Amendment* freedoms wherein definitions were not set forth. In the case styled *Ashton v. Kentucky*, 384 U.S. 195, the court in referring to the lack of a statutory definition concluded that the definition reverted to the definition at "common law" for "criminal libel; ".

"Here, as in the cases discussed above, we deal with First Amendment rights.

"Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer.

"All the infirmities of the conviction of the common-law crime of breach of the peace as defined by Connecticut judges are present in this conviction of the common-law crime of criminal libel as defined by Kentucky judges."

Then, in *Interstate Circuit v. Dallas,* 390 U.S. 676:

> "Thus, we are left merely with the film and directed to the words of the ordinance. The term 'sexual promiscuity' is not there defined . . . Nonetheless, (w)hat may be to one viewer the glorification of an idea as being 'desirable, acceptable or proper' may to the notions of another be entirely devoid of such a teaching. The only limits on the censor's discretion is his understanding of what is included within the term 'desirable, acceptable or proper.' This is nothing less than a roving commission . . . ' *Kingsley Int'l Pictures Corp. v. Regents,* 360 U.S. at 701, 3 L. Ed. 2d at 1524 (Clark, J., concurring in result). (Emphasis supplied)
>
> "Vagueness and the attendant evils we have earlier described, see supra, at 230, are not rendered less objectionable because the regulation of expression is one of classification rather than direct suppression.
>
> "It is essential that legislation aimed at protecting children from allegedly harmful expression – no less than legislation enacted with respect to adults – be clearly drawn and that the standards adopted be reasonably precise so that those who are governed by the law and those that administer it will understand its meaning and application.
>
> "Here we conclude only that 'the absence of narrowly drawn, reasonable and definite standards for the officials to follow', *Niemotko v. Maryland,* 340 U.S. 268, 271, 95 L. Ed. 267, 270, 71 S. Ct. 325 (1951), is fata." (Emphasis supplied)

Then in *Winters v. New York,* 333 U.S. 507:

> "A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions, protected by the principles of the First

Amendment, violates an accused's rights under procedural due process and freedom of speech or press.

". . . The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime 'must be defined with appropriate definiteness', Cantwell v. Connecticut, 310 U.S. 296, 85 L. Ed. 1213, etc."

The statutes prohibition of the mere possession and acquisition of materials as deemed obscene by law enforcement officials and the injunctive order enjoining such possession and acquisition together with the right of a state court to order their surrender and destruction based upon this vague and overly broad statute violates the principles enuciated by the Court in *Stanley v. Georgia*, 22 L. ed. 2d 542. The statute and injunctive order does not limit commercial possession or acquisition but extends it to private individuals under any and all circumstances. This Court stated in *Stanley*

"Appellant argues here, and argued below, that the Georgia obscenity statute, insofar as it punishes mere private possession of obscene matter, violates the First Amendment, as made applicable to the States by the Fourteenth Amendment. For reasons set forth below, we agree that the mere private possession of obscene matter cannot constitutionally be made a crime."

And then speaking of the right to receive publications regardless of their social worth:

"It is now well established that the Constitution protects the right to receive information and ideas. This freedom (of speech and press) . . . necessarily protects the right to receive . . ."

Under the circumstances of the case at bar, *Michigan Statutes Annotated 27A.2938*, upon its face, is an invalid prior restraint of *First Amendment* freedoms for not assuring by its terms the protection of non-obscene materials and for unconstitutional overbreadth by prohibiting the exercise of freedom of speech and press secured to the citizens of the State of Michigan and the United States under the *First* and *Fourteenth Amendments*.

2. : MICHIGAN STATUTES ANNOTATED, 27A.2938 et seq. are, as written, repugnant to the substantive Due Process provision of the *Fifth* and *Fourteenth Amendments* to the *Constitution of the United States* and the freedoms guaranteed under the *First Amendment* thereto because they permit the deprivation of liberty and/or property interests in the exercise of *First Amendment* rights by unreasonable, arbitrary and capricious means by law enforcement officials of the State of Michigan without a showing of a real and substantial relationship to any state's subordinating interest which is compelling to justify state action limiting *First Amendment* freedoms in that the same permits *ex parte* findings and conclusions of law and the issuance of *ex parte* injunctions restricting and inhibiting the exercise of *First Amendment* freedoms.

Michigan Statutes Annotated, 27A.2938 provides under *Sub-section (4)* for the *ex parte* determination of obscenity and authorizes a preliminary injunction to be issued upon the filing of a complaint. Under *Sub-Section (6)* all possible redress for costs or damages against the party instituting an erroneous injunction or proceeding is precluded. Additionally, all bond prior to entering the suit or applying for the injunction is waived by the statute. In effect this statute provides a ready license for an official to obtain an injunction by *ex parte* means without any necessity for care or caution.

Unlawful prior restraints in the area of the exercise of *First Amendment* expression has variously been condemned by this Court as well as numerous lower state and federal courts.

There was no adversary hearing juridicially superintended prior to the issuance of the *ex parte* injunction in the case at bar.

It is conceded that the *First Amendment* to the *Constitution of the United States* relating to liberty of speech and of the press is not so absolute so as to preclude punishment by the State or the Federal Government of obscene speech. *Roth v. U.S.A.*, 354 U.S. 476, (1957), "we hold that obscenity is not within the area of constitutionally protected speech or press."

The Supreme Court in the *Roth* case (supra) went on to state:

> "It is, therefore, vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest."

In *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), it was confirmed "the constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication. (*Lovell v. Griffin*, 303 U.S. 444)".

In *Bantam Books v. Sullivan, supra*, the Court went on to state:

> "any system of prior restraint of expression comes to this Court hearing a heavy presumption against its constitutional validity . . . "

In *Speiser v. Randall*, 357 U.S. 513 (1958), the Court stated:

> "the line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finally drawn. The separation of legitimate from illegitimate speech calls for . . . sensitive tools . . ."

In *Marcus v. Search Warrant*, 367 U.S. 717 (1961), it was stated:

> "Historically the struggle for freedom of press in England was bound up with the issue of the scope of the search and seizure power . . the question here is whether the use by Missouri in this case of search and seizure power to suppress obscenity publications involved abuses inimical to protected expression . . . for the use of these warrants implicates questions whether the procedures leading to their issuance and surrounding their execution were adequate to avoid suppression of constitutionally protected material . . we believe that Missouri's procedures as applied in this case lacked the safeguards which due process demands to assure non-obscene material the constitutional protection to which it is entitled . . ."

Against the background reported in *Marcus v. Search Warrant, supra*, the Court went on to say:

> "Kingsley Books does not support the proposition that the state may impose the extensive restraints imposed here on the distribution of these publications prior to an *adversary proceeding on the issue of obscenity* (emphasis supplied) irrespective of whether or not the material is legally obscene."

The next time a case regarding a search warrant in matters relating to obscenity came before the Supreme Court was in the case *A Quantity of Books v. State of Kansas*, 378 U.S. 205. In *Books*, the State Court Judge held a 45 minute *ex parte* hearing in which he scrutinized the books and then issued the warrant. The Supreme Court reversed saying:

> "We conclude that the procedures followed in issuing the warrant for the seizure of the books and authorizing their impounding pending the hearing were constitutionally insufficient because they did not adequately safeguard against the suppression of non-obscene books."

In a most recent pronouncement of this Court involving *First Amendment* rights and "prior restraint," *Carroll v. President and Commissions of Princess Anne, et al*, 21 L. ed. 2d 325, decided November 19, 1968, Mr. Justice Fortas, expressing the views of eight (8) members of thy Court set aside an *ex parte* injunction granted by the Maryland Courts which prohibited the holding of a rally and stated the rationale as follows:

> "It was issued *ex parte*, without notice to petitioners and without any effort, however informal to invite or permit their participation in the proceedings. There is a place in our jurisprudence for *ex parte* orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate.
>
> *"Ordinarily, the State's constitutionally permissible interests are adequately served by criminal penalties imposed after freedom to speak has been so grossly abused that its immunity is breached.* (Emphasis

supplied). The impact and consequences of subsequent punishment for such abuse are materially different from those of prior restraint. Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgment.'

"Measured against these standards, it is clear that the 10-day restraining order in the present case, issued *ex parte*, without formal or informal notice to the petitioners or any effort to advise them of the proceedings, cannot be sustained. Cf. *Marcus v. Search Warrant*, 367 U.S. 717, 731, 6 L. Ed. 2d. 1127, 1135, 81 S. Ct. 1708 (1961); *A Quantity of Books v. Kansas*, 378 U.S. 205, 12 L. Ed. 2d 809, 84 S. Ct. 1723 (1964). In the latter case, this Court disapproved a seizure of books under a Kansas statute on the basis of *ex parte* scrutiny by a judge. The Court held that the statute was unconstitutional. Mr. Justice Brennan, speaking for a plurality of the Court, condemned the statute for '*not first affording* (the seller of the books) *an adversary hearing*' (emphasis supplied) 378 U.S., at 211, 12 L. Ed. 2d at 813.

". . . there is no justification for the *ex parte* character of the proceedings in the sensitive ara of First Amendment rights.

"In the absence of evidence and argument offered by both sides and of their participation in the formulation of value judgments, there is insufficient assurance of the balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication.

"The same is true of the fashioning of the order. An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not

employ 'means that broadly stifle fundamental liberties when the end can be more narrowly achieved.' *Shelton v. Tucker,* 364 U.S. 479, 48, 5 L. Ed. 2d 231, 237, 81 S. Ct. 247 (1960). In other words, the order must be tailored as precisely as possible to the exact needs of the case. *The participation of both sides is necessary for this purpose. Certainly, the failure to invite participation of the party seeking to exercise First Amendment Rights reduces the possibity of a narrowly drawn order and substantially imperils the protection which the Amendment seeks to assure.* (Emphasis supplied)."

See also the following cases holding *ex parte* prior restraints as unconstitutional; *Metzger v. Pearcy,* 398 F.2d 202; *Poulos v. Rucker,* 288 F. Supp. 305; *Delta Book Distributors, Inc. v. Cronvich,* 304 F. Supp. 662; *Mike Sokolic v. Leo B. Ryan, et al.,* 304 F. Supp. 213; and *Cambist Films v. Tribell,* 293 F. Supp. 407.

In the case at bar the statute facially permits injunctions to issue effectively prohibiting the mere possession, acquisition or dissemination of presumptively protected *First Amendment* materials without any protection afforded to non-obscene materials. There are no standards for judging what constitutes proscribable materials. Similarly the statute encompasses those publications held entitled to protection under the theory of *Stanley v. Georgia,* supra, as well as all publications merely alleged to fall under the proscribable classes in the statute.

3. *MICHIGAN STATUTES ANNOTATED 27A.2938,* et seq. are, as written, unconstitutionally overbroad to authorize an *ex parte* injunction precluding the acquisition or possession as well as the sale or further sale or distribution of *First Amendment* materials which contain an

article or instrument which is purportedly obscene, lewd, lascivious, filthy, indecent or disgusting or which purports to be for an indecent or immoral use or purpose and is thereby repugnant to the *First, Fourth, Fifth,* and *Fourteenth Amendments* to the *Constitution of the United States.*

Michigan Statutes Annotated 27A.2938, et seq. is further void upon its face for the reason that it is all encompassing in the proscription of presumptively protected *First Amendment* materials. *Subsection (1)* authorizes the enjoining of the mere possession and acquisition of publications, magazines and books containing even an article of indecent or immoral use or purpose.

In statutes affecting and limiting *First Amendment* freedoms "(p) recision of regulation is the touchstone," *NAACP v. Button,* 371 U.S. 415. This Court has struck down the all inclusive words "sacriligious" in *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495. The words "moral, educational or amusing and harmless" was struck down by this Court for vagueness and overbreadth in *Superior Films, Inc. v.* Department of Education, 346 U.S. 587, and "immoral" in *Commercial Pictures Corp. v. Regents,* 346 U.S. 587. And again in *Holmby Productions, Inc. v. Vaughn,* 350 U.S. 870, the words "moral and proper," "cruel, obscene, indecent or immoral" were struck down as vague and all encompassing.

Similarly the statute under which Respondent has proceeded incorporates some of the same terms previously struck down by this Court, i.e., "immoral, indecent." What may appear moral to one cannot in any way be equated to the morals of another. Therefore we must have a definite statute which is applicable to all in like circumstances. This Court has set forth the tests in determining proscribable methods of expression. This statute should limit only that which is proscribable and not sweep within its terms

expression that is guaranteed to all citizens by virtue of the *First* and *Fourteenth Amendments.*

The statute also, as set forth, supra, violates the private possession and acquisition of presumptively protected materials as the principle has been laid down by this Court in *Stanley v. Georgia, supra,* not only as to any proscribable obscenity, but for articles contained in the materials that may be immoral, indecent, lewd or disgusting to the party bringing the action irrespective as to whether the materials have been disseminated.

To uphold this statute and the all encompassing injunction it has authorized would preclude the Petitioners from having any of the publications at issue in the library or confines of their individual homes. The *ex parte* and final injunction extends not only to Petitioners but also to all their agents, officers and employees effectively precluding them from their private possession.

To sustain this statute and the methods employed with the orders granted by the statute and the Circuit Court herein would, in effect, overrule the decisions of this Court as set out herein, and the decisions of multiple lower courts as well as preclude all of the freedoms guaranteed to the citizens under the *First* and *Fourteenth Amendments* to the *Constitution of the United States.*

And as stated in *A. Book v. Attorney General,* 383 U.S. 413, (Fanny Hill) this Court did not hold that portions of a publication may proscribe the entire publication but rather that the material must be "found to be *utterly* without redeeming social value." This could not be achieved where an article or portion of material may smack of being lewd, obscene or lascivious not even taking into consideration the other terms permitting proscription.

For this reason alone the statute is facially defective and repugnant to those freedoms guaranteed under the *First* and *Fourteenth Amendments* to the *Constitution of the United States.*

4. *MICHIGAN STATUTES ANNOTATED 27A.2938,* et seq. are, as construed and applied to the case at bar, unconstitutional in permitting the *ex parte* declaration of obscenity of the materials declaring that they are not entitled to constitutional protection and the *ex parte* declaration of obscenity of the materials declaring that they are not entitled to constitutional protection and the *ex parte* issuance of an Injunction prohibiting the sale, distribution, acquisition and possession by Petitioners, their officers, agents, and employees of presumptively protected *First Amendment* materials and abridges the exercise of freedom of speech and press guaranteed under the *First* and *Fourteenth Amendments* to the *Constitution of the United States.*

In the case of *Speiser v. Randall,* 357 U.S. 513, 525, (1958) the Court stated:

> "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. . . and the separation of legitimate from illegitimate speech calls for . . . sensitive tools."

In 1957, this Court considered a question concerning the constitutionality of a civil injunctive statute from the State of New York, which was designed to supplement the existing conventional criminal provisions dealing with pornography by authorizing the invocation of a "limited injunctive remedy" under closely defined procedural safeguards, against the sale and distribution of written and printed matter found after due trial to be obscene, and to obtain an order for the seizure in default of surrender, of the condemned publications. The

Court of Appeals herein in their opinion, cite that case as grounds for upholding the constitutionality of the statute at bar and the actions taken thereunder.

In that case, entitled, *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, the Court approved the statutory scheme as the same was interpreted by the New York Court, and found it constitutionally correct. Time and time again the Supreme Court has pointed to the statute in *Kingsley Books, Inc.* as a procedural model for other state legislatures to follow in supplementing their criminal obscenity statutes.

In commenting on the case of *Kingsley Books, Inc.*, in the case of *A Quantity of Copies of Books, et al, v. Kansas*, 378 U.S. 205 (1964), at page 209, the plurality opinion stated:

> "... since P-K was not afforded a hearing on the question of the obscenity even of the seven novels before the warrant issued, the procedure was likewise constitutionally deficient. This is the teaching of *Kingsley Books, Inc. v. Brown*, 354 U.S. 436. See *Marcus* 367 U.S. at pp. 734-738. *The New York injunction procedure there sustained does not afford ex parte relief but postpones all injunctive relief until 'both sides have had an opportunity to be heard', Tenney v. Liberty News Dist. 215 NYS 2d 663, 664.* In Marcus we explicitly said that Kingsley Books does not support the proposition that the State may impose the extensive restraints imposed here on the distribution of those publications prior to an adversary proceeding on the issue of obscenity, irrespective of whether or not the material is legally obscene.' *367 U.S. at 735-736." (emphasis supplied)*

In a later case involving, in essence, the questions common to the present proceedings, of "prior restraint" and

"chilling effect" on the exercise of *First Amendment* rights, the Supreme Court in a case styled, *Freedman v. Maryland*, 380 U.S. 51, at 60 (1965), stated:

> "How or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme is, of course, for the State to decide. But a model is not lacking. In *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, we upheld a New York injunctive procedure designed to prevent the sale of obscene books. *That procedure postpones any restraint against sale until a judicial determination of obscenity following notice and an adversary hearing.* (Emphasis supplied)."

In a case decided by the Supreme Court in 1968, *Teitel Film Corporation v. Cusack, et al*, 390 U.S. 139, this Court again made comment about the necessity for procedural safeguards in the sensitive area of *First Amendment* rights.

Finally, in November 1968, the Court issued its unanimous opinion in a decision entitled, *Carroll v. President and Commissioners of Princess Anne, et al.*, 393 U.S. 175 and on the issue of *ex parte* injunctions in First Amendment cases, stated:

> "There is a place in our jurisprudence for ex parte issuance, without notice, of temporary restraining orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate. . . . 'any system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity' Bantam Books v. Sullivan, 372 U.S. 51, 57 (1965). And even where this presumption might otherwise be overcome, the Court has insisted upon careful procedural provisions, designed to assure

> the fullest presentation and consideration of the matter which the circumstances permit. As the Court said in *Freedman v. Maryland*, supra, at page 58, a non-criminal process of prior restraints upon expression 'avoids constitutional infirmity only if it takes place under procedural safeguards, designed to obviate the dangers of the censorship system'."

The record herein readily discloses that no effort was made to give prior notice or to permit participation in the proceedings. Notice was afforded on the same date, however, *after* the injunctive order was obtained against Petitioners.

In a case decided by the United States District Court for the Middle District of Pennsylvania, October 21, 1969, styled *Gundlach v. Rauhauser*, 304 F. Supp. 962, the three-judge Court there considered the same question presented here as to whether the statute was defective in providing for the issuance of a preliminary injunction, without notice, in an area involving basic freedoms guaranteed by the *First Amendment*.

The Court declared and adjudged that the section of the Pennsylvania Obscenity Act authorizing civil injunctions was "violative of the *First Amendment* of the *United States Constitution.*"

In the case of *Commonwealth of Pennsylvania v. Guild Theatre, Inc., et al.*, 248 A. 2d 45, it was held that:

> "*Ex parte* action on the part of the District Attorney in instituting a complaint to restrain the exhibition of a film on the ground of its obscenity and obtaining an injunction from the Court was unconstitutional."

The Court stated:

> "We hold that the Court below erred in granting the injunction and overruling the preliminary objections. The procedure followed in this case was shockingly

defective in at least two respects – hearing without notice on the evening of July 19th, and the censorship without provision for a prompt judicial decision."

The Court went on to state:

"It is true that obscenity is not within the purview of the protections of the First and Fourteenth Amendments . . . however, the very question at issue here is whether this picture is obscene, and *until it is judicially so adjudged, it is entitled to those protections.*" (Emphasis supplied).

In a case decided by a *nisi prius* Court in the State of Rhode Island, on June 27, 1969, involving in part the constitutionality of a state statute authorizing *ex parte injunctions* in alleged obscene literature cases, the Providence Court (J. Weisberger, presiding) in a case styled *In Rem Seven Magazines, etc.*, Case No. *M.P. 8215*, stated in pertinent part:

"In connection with this complaint an ex parte restraining order was issued pursuant to the provisions of 11-31.1-4. This restraining order was issued after examination by the Court of the magazines in question, but without notice to the publishers or sellers or an opportunity to be heard by said publishers or sellers. As a consequence the representatives of the publishers of these four magazines have asked that the ex parte restraining order be dissolved. The Court will first address itself to that issue.

"It would seem to the Court that the case of *Joseph Carroll, et al. v. President and Commissioners of Princess Anne, et al.*, decided by the United States Supreme Court and reported in 21 Lawyers Edition Second, 325, (a 1968 case) as well as the *Marcus* case cited in the brief of the Attorney General and also in the brief submitted by the publishers of the four

> magazines would indicate that the issuance of a restraining order ex parte is constitutionally impermissible in relations to matters which affect First Amendment rights.

The Complaint filed by the City Attorney, although lacking any affirmative showing of compelling need or irreparable injury, would perhaps rely upon the concept that the City Attorney is attempting to protect society in one of three ways.

(1) Sales to minors under a state statute reflecting a specific and limited concern therefore,

(2) Sales to individuals that cause anti-social conduct,

(3) Sales to individuals whose morals may be impaired by the alleged salacious appeal of this material.

We recognize first that the complaint in this case indicates that there were no sales of these magazines to minors under any statute reflecting the state's specific and limited concern for juveniles as would seem to be constitutionally relevant in the cases of *Redrup v. State f New York*, 386 U.S. 767, at page 768, and *Ginsberg v. New York*, 20 L. ed. 2d 195, wherein the Supreme Court approved a statute designed for juveniles reflecting the state's specific and limited concern.

With respect to the issue of whether the material may cause anti-social conduct by virtue of sales to the interested public, the case of *Stanley v. Georgia*, 22 L. Ed. 2d 542, decided April 7, 1969, in the Supreme Court nullifies this argument by the words of the Court which state:

> "Georgia asserts that exposure to obscenity may lead to deviant sexual behavior or crimes of sexual violence. There appears to be little empirical basis for that assertion."

A footnote at this point states:

> "See, e.g., Cairns, Paul & Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence, 46 Minn. L. Rev. 1009 (1962); see also Jahoda, The Impace of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate (1954), summarized in the concurring opinion of Judge Frank in *United States v. Roth*, 2347 F. 2d 796, 814-816 (C.A. 2d Cir. 1956)."

> "More importantly, if the State is only concerned about literature inducing anti-social conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that 'among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law . . .' Given the present state of knowledge, the State may no more prohbit mere possession of obscenity on the ground that it may lead to anti-social conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits."

As to the third possible argument that could be anticipated from the City Attorney in attempting to justify an extraordinary *ex parte* relief sought here under a statute which is alleged to be unconstitutional, we would assume that the State of Michigan asserts the right to protect the individual's mind from the effects of obscenity. The Supreme Court in *Stanley v. Georgia, supra*, stated:

> "We are not certain that this argument amounts to anything more than the assertion that the state has the right to control the moral content of a person's thoughts."

A footnote at this point states:

> "Communities believe, and act on the belief, that obscenity is immoral, is wrong for the individual, and has no place in a decent society. They believe, too, that adults as well as children are corruptible, in morals and character, and that obscenity is a source of corruption that should be eliminated. Obscenity is not suppressed primarily for the protection of others. Much of it is suppressed for the purity of the community and for the salvation and welfare of the 'consumer'. Obscenity, at bottom, is not crime. Obscenity is sin." Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Col. L. Rev. 391, 395 * (1963).
>
> "To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment."

In a 1936 case discussing the impact and permissible limitations on the exercise of *First Amendment* rights, *Herndon v. Lowry*, 301 U.S. at page 258, the Court stated:

> "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the constitution."

In *Bantam Books v. Sullivan*, 372 U.S. 58, the Court said:

> "Thus, the Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often

separated from obscenity only by a dim and uncertain line. It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments. Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards, *Smith v. California*, 361 U.S. 147, 4 L. ed 2d 205, 80 S. Ct. 215; *Marcus v. Search Warrant of Property* (US) *supra*, is therefore but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks. Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. See *Near v. Minnesota*, 283 U.S. 697.

Schneider v. Irvington, 308 U.S. at 159:

"Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion.

"This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.

"In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise

> of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

Terminiello v. Chicago, 337 U.S. 1:

> "That is why freedom of speech . . . is . . . protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

See also *Drive In Theatres, Inc. v. Huskey*, 305 F. Supp. 1232; *Cambist Films v. State of Illinois*, 292 F. Supp. 185; *Delta Book v. Alwynn J. Cronvich*, 304 F. Supp. 662; *Mike Sokolic v. Leo B. Ryan, et al*, 304 F. Supp. 213 (1969; *Geibig et al. v. City of Hallendale et al*, 1969 (U.S.D.C.–S.D. Fla.) No. 69-1005-Civ.; *Poulos v. Ricker*, 288 F. Supp. 305.

The threat to the existance of the publications herein stems from the issuance of the *ex parte* Temporary Injunction on an *ex parte* judicial determination of obscenity regardless of any ultimate determination of obscenity or non-obscenity after trial and all appeals. The statute does not even require the Respondents to show probable cause.

The *First Amendment* question is – Do the procedures used to enforce the Obscenity statute increase the pressures of state censorship or self censorship to a constitutionally unacceptable degree? The Petitioner avers that it does as construed and applied herein.

As to these publications, a prior adversary determination would not need to have been a fully matured action at law, *Tyrone, Inc. v. Wilkinson*, 410 F. 2d 639 (4th Cir. 1969).

It would eliminate honest mistakes which are sometimes made by the City Attorney, or by the police, or by the publishers, or the courts with enormous ultimate saving in time to all.

Restraints and suppressions of public sales of *First Amendment* materials prior to a judicially superintended adversary determination of obscenity are unconstitutional by any procedure, criminal or civil.

5. THE PRESUMPTIVELY PROTECTED *FIRST AMENDMENT* MATERIALS, heretofore adjudged obscene and under judicial order for destruction and which were subjected to a Preliminary *ex parte* Injunction and Permanent Injunction preventing their dissemination, are not obscene in the constitutional sense, absent any evidence of the sort of pandering which this Court deemed significant in *Ginzburg v. U.S.*, 383 U.S. 463, and in which there is no claim asserted that the statute reflects a specific and limited state concern for minors or absent any evidence or suggestion of an assault upon individual privacy by publication in a manner so obstrusive, as to make it impossible for an unwilling individual to avoid confrontation with the materials.

The Michigan statute sets forth no definition for the determination of proscribable materials. If the statute is authoritatively construed to incorporate those tests enunciated by this Court then the materials and publications herein are not proscribable and constitute expression protected under the *First* and *Fourteenth Amendments* to the *Constitution of the United States*.

The constitutionally proper test in the determination of proscribable obscenity is:

> "(a) The dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." Redrup v. New York, 386 U.S. 767.

All three of these tests must be independently determined and applied. After this application, each and every one of the tests must coalesce before the material can be deemed obscene. *Memoirs v. Massachusetts,* 383 U.S. 413.

None of the individual tests apply to the materials sought to be suppressed by the City Attorney for Grand Rapids, Michigan. These materials are publications containing photographs of males and females partially disrobed and in the nude. In none of these publications are there any sexual activities conducted. Nudity and obscenity are not synonymous. Several of the individual publications have editorially commented that the magazine is an art publication exclusively for use in furnishing serious artists and persons interested in art having difficulty obtaining living models with pictures to be used as substitutes for drawing, painting and sculpturing. Therefore the material taken as a whole does not appeal to the prurient interest in sex and does not exceed the limits of candor tolerated in the national community and similarly does have redeeming social value.

In a dissenting opinion filed by Mr. Justice Stewart joined by two other justices reflection was cast upon the definition of obscenity under the Florida Statute in question. Mr. Justice Stewart noted in *Fort v. Miami,* 389 U.S. 918:

> "It is clear that the ordinance under which he was convicted is unconstitutional on its face. That ordinance adopts the definition of obscenity embodied in a Florida statute.
>
> "For the purpose of this section, the test of whether or not material is obscene is: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.
>
> "Members of this Court have expressed differing views as to the extent of a State's power to suppress 'obscene' material through criminal or civil proceedings. But it is at least established that a State is without power to do so upon the sole ground that the material 'appeals to prurient interest.'
>
> "The petitioner in this case was charged, tried, and convicted under a statutory provision which contains no other criterion of 'obscenity.' This conviction therefore rests upon a law incompatible with the guarantees of the First and Fourteenth Amendments of the United States Constitution."

Since the Michigan statute has not incorporated any test and has failed to set forth the tests enunciated by the Supreme Court of the United States, the statute is rendered invalid for vagueness and is thereby repugnant to the freedoms guaranteed under the *First* and *Fourteenth Amendments*. As was stated in *Speiser v. Randall*, 357 U.S. 513:

> "(T)he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed or punished is finely drawn."

The United States Supreme Court has reversed the Massachusetts Supreme Court for their lack of incorporation within the judicial construction of obscenity the requirement that "the material is *utterly* without redeeming social value, *Memoirs v. Massachusetts, supra.* The state Court had held that a mere modicum of social value was not enough to prevent the publications from being declared obscene.

If the statute has been authoritatively construed to contain the necessary minimal tests under *Memoirs,* the materials are still not proscribable absent the depiction of sexual congress or hard-core pornography.

The test advocated by the Supreme Court for determining obscenity *vel non* appears now to be limited to "hard-core" pornography.

The obvious advantage of the "hard-core" pornography test is that it directs the Court's attention to the material itself and avoids the antiquated and ultra-subjective appeal formula of the old *Roth-Alberts* test.

In *State v. Voshart, 39 Wis. 2d 419* (1968), the Supreme Court of Wisconsin stated:

> "This 'hard-core pornography' test has been described as most clearly indicating what may be considered to be obscene because' . . . it does describe something that most judges and others will (know . . . when they see it) . . . and that leaves the smallest room for disagreement.'"

Donnenberg, et al vs. State, 1 Md. App. 59, (1967):

> "Even assuming that to be hard-core pornography there must be illustrated incidents of sexual activity, normal or perverted, involving some 'act' we feel that

> the photographs . . . sufficient "act' to be flagrant erotica and that the publication, taken as a whole, not only speaks for itself, but screams for all to hear that it is obscene."

In a recent order and opinion of a Federal District Court Judge in the Eastern District of Wisconsin, dealing with criminal obscenity, *U.S.A. Art Films International, Inc. et al. No. 68 CR 104*, the Court in ruling on the Defendant's Motion to Dismiss had this to say:

> "Whether a particular work is obscene implies an issue of constitutional law. See *Jacobellis v. Ohio*, 378 U.S. 184 at pp. 187-190 (1964). If possible, the constitutional question must, therefore, be decided by the court when the motion is made and when it is made prior to trial, a pretrial determination must be made, in order that materials protected by the First Amendment are not subjected to a legal proceeding for any longer than necessary. On this basis, this court believes that a motion to dismiss on the grounds that the materials are not obscene as a matter of law, the materials must be reviewed and the obscenity test applied at a hearing on the motion."

The Supreme Court itself has authorized this approach in its *per curiam* opinion in *Redrup v. New York, 386 U.S. 767*, and the historical application thereof in reversing summarily multiple convictions or findings of State and Federal Trial Courts and Appellate Courts of obscenity of multiple classes of materials, as will be more fully set out herein.

It seems perfectly clear that This Court in offering a workable solution for the lower Courts in obscenity litigation, civil or criminal, *in rem* or *in personam* has restricted the determination of obscenity *vel non* to those materials depicting a sexual activity.

Redrup v. New York, supra, states the controlling legal principles. After outlining the diverse views of the individual justices,[1] the Court held that "whichever of these constitutional views is brought to bear upon the cases before us, it is clear that the judgments cannot stand." *Redrup, supra* at *771*.

The Court affirmed its position historically by granting and reversing summarily each of the following cases since ruling in *Redrup v. New york, supra*, on May 8, 1967.

1. *Keney v. New York, 38 U.S. 440* (1967)
   Books found not constitutionally obscene; *Sin servants Lust School* and *Lust Web.*

2. *Friedman v. New York, 38 U.S. 441* (1967)
   Booklets found not to be constitutionally obscene: *Bondage Boarding School; Bound and Spanked; English Spanking School; Sweeter Gwen; Travelling Saleslady Gets Spanked; Bound to Please; Heat Ways; Bizarre Summer Rivalry; An Escape Into Bondage, Book No. 2.*

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1 "Two members of the Court have consistently adhered to the view that a state is utterly without power to suppress, control, or punish the distribution of any writings or pictures upon the ground of their 'obscenity.' A third has held to the opinion that a State's power in that area is narrowly limited to a distinct and clearly identifiable class of material. Others have subscribed *to a not dissimilar standard*, (emphasis supplied), holding that a State may not constitutionally inhibit the distribution of literary material as obscene unless '(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it *(386 US 771) affronts contemporary community standards relating to the description of representation of sexual matters; and, (c) the material is utterly without redeeming social value, emphasizing that the three elements must coalesce and that no such material can be 'proscribed unless it is found to be *utterly* without redeeming social value.'" Memoirs v. Massachusetts, *383 U.S. 413, 418-419, 16 L. ed 2d L, 5, 6, 86 S Ct 975.*

Another Justice has not viewed the "social value" element as an independent factor in the judgment of obscenity. Id. at 460-462, 16 L ed 2d at 29, 30 (dissenting opinion).

3. *Ratner v. California, 388 U.S. 442* (1967)
Film *Honey Bee* found not constitutionally obscene.

4. *Aday v. United States,* 388 U.S. 447 (1967)
Book, *Sex Life of a Cop,* found not constitutionally obscene.[2]

5. *Books, Inc. v. United States, 38 U.S. 449* (1967)
Book *Lust Job* found not constitutionally obscene.[3]

6. *Corinth Publications, Inc. v. Wesberry, 38 U.S. 448,* (1967).
Book *Sin Whisper* found not constitutionally obscene.[4]

7. *Advansino v. New York, 38 U.S. 446* (1967)
Packets of female nude photographs and book *Promenade Bondage* found not constitutionally obscene.

8. *Cobert v. New York, 38 U.S. 443* (1967)
Films *Jane Palmer No. 2, N.Jordon and Jayne Tracy* found not constitutionally obscene. [5]

9. *Sheperd v. New York, 388 U.S. 444* (1967)
Sets of nude female photographs found not constitutionally obscene.

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[2] Same case below: *357 F 2d 855* (1966), *216 F. Supp. 911* (1963).
[3] Same case below: *358 F. 2d 935.*
[4] Same case below: *146 S.E. 2d 764.*
[5] Same case below: *207 N.E. 2d 619.*

10. *Quantity of Books v. Kansas, 38 U.S. 452* (1967)
Books found not constitutionally obscene: *Sin Hooked, Bayou Sinners, Lust Hungry, Shame Shop, Fleshpot, Sinner Seance, Passion Priestess, Penthouse Pagans, Shame Market, Sin Warden* and *Flesh Avenger.*[6]

11. *Schackman v. California,* 388 U.S. 454 (1967)
Girlie pictures in coin-operated peep shows: D-15, O-12, O-7, B-1 and B-19 found not to be constitutionally obscene.

12. *Central Magazine Sales v. U.S., 389 U.S. 50* (1967)
Magazines found not constitutionally obscene: *Exclusive, International Nudist Sun, No. 16* and *Review International No. 6.*[7]

13. *Potomac News Co. v. United States, 389 U.S. 47* (1967)
Magazines *Hellenic Sun, Number 2* found not constitutionally obscene.[8]

14. *Chance v. California, 88 S. Ct, 264* (1967)
Sets of nude photographs found not constitutionally obscene.

15. *I.M. Amusement Corporation v. Ohio, 389 U.S. 573* (1968)
Film strip of two females acting like Lesbians and fondling one another found not constitutionally obscene.[9]

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[6] Same case below: *416 P. 2d 703.*
[7] Same case below: *373 F. 2d 633* (1967), *253 F. Supp. 485,* (1966).
[8] Same case below: *373 F. 2d 635* (1967), *253 F. Supp. 498* (1966).
[9] Same case below: *266 N.E. 2d 567.*

16. *Robert-Arthur Management Corp. v. State of Tennessee, 38 U.S. 578* (1968)
Movies of women caressing one another and acting as Lesbians found not constitutionally obscene.[10]

17. *Henry v. State of Louisiana, 20 L. ed 1343* (1968)
Eleven "girlie" magazines found not to be constitutionally obcene.[11]

18. *Felton v. City of Pensacola, 390 U.S. 340* (1968)
Male and female nude magazines found not to be constitutionally obscene.[12]

19. *Mazes v. Ohio, 38 U.S. 453* (1967)
"Girlie" magazines found not to be constitutionally obscene.[13]

20. *Conner v. City of Hammond, 389 U.S. 431* 1967)
"Girlie" magazines found not to be constitutionally obscene.[14]

21. *Carlos v. New York, Docket 524,* December 8, 1969.

This Court has ruled a publication of nude photographs with a focus on the pubic area featuring poses of female nudes in lewd attitudes and positions, including legs widespread to reveal the genital area in its entirety, as being not obscene as a matter of law and comparable with simple "girlie" magazines. *Central Magazines Sales, Ltd. v. U.S.A.,*

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[10] Same case below: *414 S.W. 2d 638.*
[11] Same case below: *198 So. 2d 89.*
[12] Same case below: *200 So. 2d 842.*
[13] Same case below: *218 N.E. 2d 725.*
[14] Same case below: *196 So. 2d 276.*

supra, reversing *373 F. 2d 633*[15] and *253 F. Supp. 485*, and in *Ginsberg v. New York, 390 U.S. 629*, (April 24, 1968) the Court observed:

> "The girlie picture magazines involved in the sales here are not obscene for adults. *Redrup v. New York, 386 U.S. 767.*"

A footnote at that point in the decision directs the reader to an observation which states:

> "Other cases which turned on findings of nonobscenity of this type (girlie) magazines include: *Central Magazines Sales, Ltd. v. United States, 389 U.S. 50* . . ."

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[15] In *373 F. 2d 633* at page *634* the 4th Circuit observed:

"We agree, also, that EXCLUSIVE is obscene."

"EXCLUSIVE is a collection of photographs of young women, in most of them, long stockings and garter belts are employed to frame the pubic area and focus attention upon it. A suggestion of masochism is sought by the use of many of the pictures of chains binding the models' wrists and ankles. Some of the seated models, squarely facing the camera, have their knees and legs widespread in order to reveal the genital area in its entirety. In one of the pictures, all of these things are combined: The model clad only in a framing black garter belt and black stockings is chained to a chair upon which she is seated, facing the camera, with one knee elevated and *both spread* wide." (Emphasis supplied)

"We agree with the District Court that these apparently unretouched pictures of young women, posed as they are, are patently offensive and that the magazine EXCLUSIVE is obscene."

The decision of the Circuit Court of Appeals was appealed on a petition for a Writ of Certiorari to the Supreme Court of the United States on October 23, 1967, the Court reported out as follows:

"PER CURIAM. The Petition for a Writ of Certiorari is granted and the judgment of the United States Court of Appeals for the Fourth Circuit is reversed. *Redrup v. 386 U.S. 767.*"

It is clear that the Supreme Court has seen no difference between the classic "girlie" magazines such as *Spree, High Heels,* (*Austin v. Kentucky, 386 U.S. 767* 1967), *Gent, Swank, Bachelor, Ace, Cavalcade, Gentleman* and *Sir,* (*Gent v. Arkansas, 386 U.S. 767,* 1967), *Escapade, Dude, Gent, Rogue, H.Q. Cavalier,* and *Knight* (*Conner v. City of Hammond,* supra, 1967) and the magazine *Exclusive*[16] about which it was said by the United States District Court for the District of Maryland, "The pictures of the women in the magazine *Exclusive* are so elemental that the ordinary judge or juror should be able to recognize the nature of their appeal to the average man. (prurient appeal). "[17]

See also:

People v. Billingsley et al. C.A. of Mich. No. 5544-46. Grant vs. U.S., 380 F.2d 748 (1967). U.S. v. One Book Entitled Father Silas, 249 F. Supp. 911 (1966) *Royal News Co. v. Schultz, 230 F. Supp. 641* (1964)

The United States Court of Appeals for the Eighth Circuit, in *Luros v. United States, 389 F.2d 200, at p. 202,* made essentially the same observation as the Supreme Court later did in *Ginsberg v. N.Y.,* supra, *to the effect that "girlie" magazines are not obscene when it reported:*

> " . . . magazines consisting of pictures of scantily clad and nude models, generally posed in suggestive and provocative positions (called 'girly' magazines). Although described as 'sexually provocative,' these are generally not within the proscription of the statute." *(Sec. 1461 & 1462, Title 16 U.S.C.A.)*

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16 *Central Magazine Sales, Ltd. v. U.S.A.,* supra.

17 *U.S.A. v. 392 Copies of a Magazine Entitled "Exclusive," supra.* (DC-Md 1966)

The Court in the *Luros* case went on to make this observation:

> "In *Redrup v. State of New York, 386 U.S. 767,* there is specific indication that a majority of the Supreme Court adopts standards 'not dissimilar' to banning only 'hard-core' pornography. Subsequent application of *Redrup gives no contraindication.*"

In the case of *People v. Noroff, 433 P. 2d 479, 63, Cal. Rptr. 575* (1967), the Supreme Court of California comes to a like conclusion when it states at *P. 481:*

> "The graphic depiction of such sexual activity seems to be the distinguishing feature of the only materials which the United States Supreme Court has ever ruled obscene. The publications involved in *Ginzburg v. United States, 383 U.S. 462,* contained descriptions and photographic essays dealing explicitly and dynamically with sexual relations; the court noted that the petitioners were guilty of 'animated sensual detail' to give the publication a salacious cast . . .' the film central to the litigation in *Landau v. Fording,* 388 U.S. 456 *"explicitly and vividly revealed acts of masturbation, oral copulation . . . sadism, masochism, and sex . . . such materials and no others, have been thought to constitute 'hard-core' pornography. (See the dissenting opinion of Stewart, J. In Ginsburg v. U.S., supra,* see also *Magrath, The Obscenity Cases: Grapes of Roth, The 1966 Supreme Court Review 7, at 71.)"*

To determine what it is that Justice Stewart has defined as "hard-core" pornography and about which *Redrup* reports that four members of the Court have adopted "not a dissimilar standard," we are referred to *Ginzburg v. U.S.,* supra, where Justice Stewart undertakes to define "hard-core" pornography as follows:

"Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character . . . "

The highest Appellate Court in the State of Ohio was led to remark in its opinion in the case of *State v. J.L. Marshall News Co., 232 N.E. 2d 435* (1967) as follows:

"By absorbing Mr. Justice Stewart's limitations into its previous definitions of constitutionally proscribable obscenity, the Court has made clear that it is determined to close once and for all the Pandora's Box it opened in *Roth v. United States, 354 U.S. 467* which required all the Courts in the country to act as constitutional literary censors."

"Redrup holds that except under laws dealing specifically with juveniles, the state may not constitutionally proscribe any material other than hard-core pornography as described by Mr. Justice Stewart in Ginzburg."

See *United States v. Klaw, 350 F.2d 155.*

The United States Court of Appeals for the First Circuit in the case of *Excellent Publications, Inc. v. United States, 308 F. 2d 362*, citing *Sunshine Book Co v. Summerfield, 355 U.S. 372*, stated:

" . . . *front view group photographs of naked men, women and children with exposure of the genital area of both sexes are not obscene as a matter of law* . . . in short the pictures simply are not the kind of 'hard-core pornography' within reach of the statute construed in the light of the constitutional guarantee of freedom of the press." (Emphasis supplied).

In one of the opinions in *Manual Enterprises v. Day, 370 U.S. 478* (1962) at page *488*, Justice Harlan wrote:

> "At least one important state court and some argumentative commentators have considered *Roth* and subsequent cases to indicate that only 'hard-core' pornography can constitutionally be reached under this or similar state obscenity statutes."

The State of Wisconsin Supreme Court on June 7, 1968, in a case styled *States v. Voshart, 39 Wis. 2d 419*, observed:

> "There appears to be two such definitions that have been given Supreme Court approval . . . the alternate definition defines 'obscene' as meaning 'hard core' pornography."

The United States Court of Appeals for the Ninth Circuit in *Culbertson v. State of California, 385 F. 2d 209* (1967) views the Federal Standard of obscenity as embracing only "hard core" pornography when it reports:

> "We have examined the photographs in question. Each depicts four scantily clad women whose poses might be provocative to some. The pictures are not artistic, but we are thoroughly convinced that they are not 'hard core' pornography and that they do not, in their expression, go substantially beyond customary limits of candor. *Redrup v. New York, supra.*"

It is clear that when the United States District Court for the Central District of California[18] considered the importance of the 65 multiple issue numbers of female 'girlie' magazines and finding the same not to be obscene relying on

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[18] *U.S.A. v. 80 Cartons, etc. Civil No. 68-430-HH* (4-30-68) *U.S.A. v. Three (3) Packages, etc, Civil No. 68-25-F* (2-20-68). Both cases from U.S.D.C. California.

Central Magazine Sales, Ltd. v. U.S.A., supra, which in turn relied on *Redrup v. N.Y.*, they were viewing the Federal Standards as requiring the proscription only of "hard-core" pornography, in an obscenity *vel non* determination.

The United States District Court for the District of Maryland in a decision joined by all members of the bench in *U.S. v. 4,400 Copies of Magazines, etc., 276 F. Supp. 902* reported:

> "It appears, therefore, that persons to whom the magazines will be offered commercially, and the methods by which they will be offered, are factors to be considered in determining whether their dissemination is protected by the *First Amendment.*"

Publications photographically depicting the female body either partially clothed or with no clothing and static or sexually provocative with an emphasis on the pubic area or genital area are "girlie" magazines and clearly not obscene for adults.

The magaines and publications before this Court in the case at bar not heretofore adjudicated are comparable to other magazines and publications that have been ruled "not obscene" in Federal Courts and as such are entitled to the protection of the *First Amendment* to the *Constitution of the United States.*

The Supreme Court of the Commonwealth of Virginia recently had before it a case involving "girlie" magazines, and reported out its opinion on September 5, 1969, in an opinion by Chief Justice Eggleston, *House v. Commonwealth of Virginia, 169 S. E. 2d 572,* wherein the Court stated in pertinent part as follows:

"From an examination of the three magazines here involved, in the light of that opinion (*Jacobellis v. State of Ohio, supra*) and the other rules laid down by the Supreme Court of the United States, our conclusion is that it has not been shown beyond a reasonable doubt that these publications are obscene.

"Without attempting to describe the magazines, or the particular scenes depicted there which the witnesses for the Commonwealth found offensive, it is sufficient to say that they are what is 'commonly called girlie' magazines. They carry pictures of nude and partly clothed men and women. The leading article in one relates to the experiences of a call-girl prostitute. But nudity is not necessarily obscenity, as the courts have frequently pointed out. *Excellent Publications, Inc. v. United States, 309 F. 2d. 362* (1st Cir. 1962); *People v. Biocio, 80 Ill. App. 2d 65 224 N.E. 2d (572)* 1967)."

In the case of People of the State of *California v. Rosakos, 74 Cal. Rep. 34,* (1968) the appellate Court stated:

"The picture depicted a semi-nude female posing in such a manner as to show her breasts and vaginal area. These pictures would seem to be quite similar to those described in *People v. Noroff, supra,* where at page 794, 63 Ca. Rptr. at page 577, 443 P. 2d at page 481, the court says: 'The publication admittedly makes no effort to conceal either male or female genitals, and several of the poses seem contrived to preserve genital exposure at the expense of aestetic considerations.' * * * Having thus found that the pictures in question are not obscene per se can they be made so by the seller's pitch and comeon as hereinabove related? We hold they cannot. The seller's statement certainly cannot make that which is not obscene, obscene."

See also, *In. Re. Panchot, 73 Cal. Rptr. 689* (1968) where the Supreme Court of California stated:

> "The substantive activity condemned in this case consisted of selling four packets of photographs depicting nude females posing singly. In these crude photographs, the subjects assume various poses singly, which emphasize various parts of the body. None of the poses, however, depicts any form of sexual activity."

The present proceedings result from the action of the City Attorney of Grand Rapids, Michigan, filing a complaint seeking an Interlocutory Judgment of obscenity contemporaneous with a Temporary Injunction. There were no allegations of dissemination beyond an "adults only" atmosphere. There is no evidence alleged or before the Court of *Ginsburg-type* pandering, in dissemination of the named magazines, (widespread indiscriminate mailing of 5 million brochures which by the language of said brochures classified the material being offered for sale by mail order, as OBSCENE.) There was no allegation of intrusion into the privacy of unwilling individuals who want to avoid confrontation with this kind of material and there is no evidence of sales or offering to exhibit to minors under any state statute reflecting a specific and limited state concern for juveniles.

It would appear that this Court has held that only when there exists an encroachment on the constitutional rights of others may a State permissibly punish an offender for violation of the state obscenity laws, or can materials presumptively protected under the *First Amendment* be stated to be obscene in the Constitutional sense.

The Supreme Court in *Roth v. United States*, 354 U.S. 476, at 488, stated:

> "The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring Federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests."

At this point in the opinion a footnote, No. 23, directs us back to Footnote No. 14 of the opinion.

Footnote No. 14 follows these words by the Court:

> "All ideas having even the slightest redeeming social importance – unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion – have the full protection of the guaranties, *unless excludable because they encroach upon the limited area of more important interests.*" (Emphasis supplied).

The footnote No. 14, referenced in *Roth*, cites among others, the case of *Breard v. Alexandria*, 341 U.S. 622.

The *Breard* case, involving the construction of an ordinance, held *inter alia* as applied to solicitors of magazine subscriptions not to unconstitutionally abridge freedom of speech and press.

The opinion of the Court, addressing itself to the exercise of *First Amendment* rights of Petitioners therein stated:

> "The First and Fourteenth Amendment have never been treated as absolutes. *Freedom of speech or press does not mean that one can talk or distribute where, or when and how one chooses.* Rights other than those of the advocates are involved. By adjustment of rights, we can have both full liberty of expression and an orderly life. (Emphasis supplied).

The Supreme Court in a per curiam opinion in *Redrup v. State Of New York, 386 U.S. 767,* appeared to delineate what may have been meant in *Roth* and *Breard* about "encroachment" upon rights of others, which may be significant in determining whether material alleged to be obscene is without the ambit of the *First Amendment* when it stated:

> "In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles . . . In none was there any suggestion of an assault upon individual privacy by publication in a matter so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. CF. *Breard v. Alexandria, 341 U.S. 622; Public Utilities Commission v. Pollak, 343 U.S. 451.* And in none was there evidence of the sort of 'pandering' which the Court found significant in *Ginzburg v. United States, 383 U.S. 463.*"

The United States Supreme Court after its per curiam opinion in *Redrup v. New York, supra,* granted Certiorari and/or review in more than twenty one (21) cases coming before the Court, and summarily reversed the findings of obscenity, as has heretofore been indicated, the latest under the Burger Court on December 8, 1969.

The Supreme Court in *Ginsburg v. State of New York, 20 L. Ed. 2d 195,* in holding a state statute in question as

reflecting "a specific and limited state concern for juveniles." *Redrup v. New york, supra,* went on to state:

> "The 'girlie' picture magazines involved in the sales here are not obscene for adults."

A footnote No. 3 at this point states in part:

> "Other cases which turned on findings of non-obscenity of this type of magazines include *Central Magazines Sales, Ltd., v. United States, 389 U.S. 50, Conner v. City of Hammond, 389 U.S. 48; Potomac News Co. v. United States, 389 U.S. 47* . . ."

The various inferior Federal Courts and state appeals courts, in viewing *Redrup v. New york, supra* as the same has been apparently historically applied by the Supreme Court of the United States, have held to the "juveniles," "encroachment" and "Ginzburg pandering" standards for determining criminal conduct and/or obscenity of the publications before the various Courts, sufficient to remove the protection afforded the interested adult public in their exercise of constitutionally protected freedom of press and speech.

In an en banc per curiam decision joined in by all five (5) members of the United States District Court for the District of Maryland, *United States v. 4,400 Copies of Magazines, Including 200 Copies each of Magazines Entitled Cover Girl Nos. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16; and Exciting Nos. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16,*reported in *276 F. Supp. 902* (December 21, 1967) it was stated in pertinent part:

> "It appears, therefore, that persons to whom the magazines will be offered commercially, and the

methods by which they will be offered, are factors to be considered in determining whether their dissemination is protected by the First Amendment.

* * * * * * *

"... this Court is of the opinion that if the magazines involved in this case are sold to juveniles, or are offered for sale in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to them, or if they are offered for sale in a manner which amounts to pandering within the principles stated in *Ginzburg v. United States, 383 U.S. 463,* at *465-466,* they would not be entitled to the protection of the First Amendment."

Today, absent Ginzburg type pandering and in any event foisting on an unwilling public, no publication or motion picture film is obscene in the constitutional sense. *Redrup v. New York, supra; 386 U.S. 676, 769; Breard v. Alexandria, supra; Public Utilities Commission v. Pollak, supra; Stanley v. Georgia, supra; Stein v. Batchelor, 300 F Supp 602; Poulos v. Rucker, 388 F. Supp. 305, 307.* The Wisconsin statute herein must be construed and interpreted to incorporate these tests.

Mr. Justice Potter Stewart in his dissenting opinion in the case of *Ginzburg v. U.S., 383 U.S. 463* (1966) at page *499,* stated with respect to the alleged *Roth-Alberts* test of obscenity in footnote 2 as follows:

"It is not accurate to say that the Roth opinion 'fashioned standards' for obscenity because as the Court explicitly stated, no issue was there presented as to the obscenity of the material involved. 354 U.S. at 481. In no subsequent case has a majority of the Court been able to agree on any such 'standards."

Mr. Justice Stewart in his dissent went on to say:

> "There does exist a distinct and easily identifiable class of material in which all of these elements coalesce. It is that, and that alone, which I think government may constitutionally suppress, whether by criminal or civil sanctions. I have referred to such material before as hard-core pornography, without trying further to define it. *Jacobellis v. Ohio, supra.* In order to prevent any possible misunderstanding, I have set out in the margin a description, borrowed from the Solicitor General's brief, of the kind of thing to which I have referenced."

Thereupon, Mr. Justice Stewart used the following language to describe what he meant by "hard core pornography" as follows:

> "Such materials include photographs, both still and motion picture with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character."

Mr. Stewart in his opinion stated further:

> "So it is that the Constitution protects coarse expression as well as refined, and vulgarity no less than elegance. A book worthless to me may convey something of value to my neighbor. In the free society to which our Constitution has committed us, it is for each to choose for himself."

At this point in his opinion he suggests the rationale that was to become the ruling of the Court in *Redrup v. N.Y.* supra, when he states:

> "Different constitutional questions would arise in a case involving an assault upon individual privacy by publication in a manner so blatant or obtrusive as to

> make it difficult or impossible for an unwilling individual to avoid exposure to it. *Cf. e.g. Breard v. City of Alexandria, 341 U.S. 622; Public Utilities Commission v. Pollak, 343 U.S. 451.* Still other considerations might come into play with respect to laws limited in their effect to those deemed insufficiently adult to make an informed choice. No such issues were tendered in this case."

In the opinion of the Court, authorizing Mr. Justice Marshall to speak on behalf of six members of the Court, in *Stanley v. Georgia,* 22 L. Ed. 2d 542, at 551, it was stated:

> "But that case (Roth) dealt with public distribution of obscene materials and such distribution is subject to different objections. For example, there is always the danger that obscene material may fall into the hands of children, see *Ginsberg v. New York, supra,* or that it might intrude upon the sensibilities or privacy of the general public. See *Redrup v. New York,* 386 U.S. 767. *No such dangers are present in this case."*

The Court thereafter went on to say:

> "If a rich Stanley can view a film, or read a book, in his home, a poorer Stanley should be free to visit a protected theatre or library. We see no reason for saying he must go alone."

Under the rational suggested by the cases quoted herein, no publication before this Court in the premises can or should be declared obscene and without the protection of the *First Amendment* unless it can be shown that the Defendants in their dissemination have abused and intruded on the rights of others.

6. The state under *Michigan Statutes annotated, 27 A.2938 et seq.* in proscribing materials as obscene must

affirmatively produce evidence that (a) the presumptively protected materials have a dominant theme that taken as a whole appeals to the prurient interest in sex; (b) the matter is patently offensive because it affronts contemporary community standards relating to the description of sexual matters; and (c) the materials are utterly without redeeming social value, and that the three elements have coalesced before the materials may constitutionally be suppressed and without the protection of the *First* and *Fourteenth Amendment* to the *Constitution of the United States.*

Since obscenity prosecutions are in themselves fraught with vagueness, the Courts have held that in such prosecutions, undertaken under a constitutionally permissible basis, the Prosecution has the affirmative responsibility to adduce appropriate evidence to establish each element of its concept of obscenity.

In *Re. Giannini, 72 Cal. Rptr. 655* (1968) the Supreme Court of California stated in pertinent part:

> "We conclude the convictions must be set aside because the prosecution failed to introduce any evidence of community standards either that Iser's conduct appealed to prurient interest or offended contemporary standards of decency. . . . To sanction convictions without expert evidence of community standards encourages the jury to condemn as obscene or offensive to the particular juror. . . . We conclude that the judgment must be vacated for lack of evidence as to whether applying contemporary community standards petitioner Iser's dance appealed to the prurient interests of the audience and offended accepted standards of decency."

The Supreme Court of the Commonwealth of Virginia likewise was held in the case of *House v. Commonwealth, 169*

S. E. and 572, reported on September 5, 1969 on this issue as follows:

> "In the first place there is no evidence that according to or applying contemporary community standards the dominant theme of the magazines in question appealed to the prurient interest of the reader or that they were patently offensive because they affronted contemporary community standards relating to the description or representation of sexual matters. That is, there is no evidence that these publications were offensive because they affronted contemporary community standards relating to the description of such matters."
>
> * * * * * * *
>
> "As to the sufficiency of the evidence,we agree with the defendant that since the statute provides punishment for 'every person who *knowingly* . . . commercially distributes . . . any *obscene* matter, the burden was on the Commonwealth to show that the magazines were obscene and that the defendant knew they were obscene when he distributed them to retail dealer Swersky.* * *In accord with this view we hold that in the absence of evidence that these magazines affronted the standards of the community, the evidence on behalf of the Commonwealth was insufficient to sustain the conviction of the defendant."

See also:

U.S. v. Klaw, 350 F.2d 155, 167 (2d Cir. 1965), Smith v. People of the State of California, 361 U.S. 147 at page 165 (Frankfurter J. Concurring)

The Supreme Court of the Commonwealth of Pennsylvania recently considered this issue in *Duggan v. Guild Theatre, Inc. et al.*, No. 256, March Term, 1969, and said in pertinent part as follows:

> "Nor, has the district attorney proved that this movie 'affronts contemporary community standards' relating to the representation of sexual matters. Each one of his witnesses called to testify as to contemporary community standards admitted that they had no idea what these standards were. The district attorney in his brief admits that he produced no expert testimony on this issue, yet urges us to find that the movie affronts contemporary standards. This we cannot do. Courts of law are not capable of deciding what contemporary standards are, without the benefit of any evidence whatsoever. *Cf. Dell Publications, 427 Pa. at 193, 223 A.2d at 843.*"
>
> "As for the third independent test, the district attorney has not proved 'Therese and Isabelle' to be utterly without redeeming social value. * * *
>
> "Thus the Commonwealth has not shown, under any one of the three independent standards set forth in *Memoirs and Dell Publications that* 'Therese and Isabelle' is constitutionally obscene."

From the transcript of the trial in the Circuit Court for Kent County it is readily seen that none of the tests have been proven by any credible evidence. This was also true at the time of the issuance of the *ex parte* Injunctive Order issued by His Honor, Judge Letts.

No evidence was produced at the trial of this cause that the publications were sold or offered for sale to an unwilling purchaser or foisted upon an unwilling individual. The record affirmatively disclosed that no dissemination of publications were conducted upon the property of the Kent County Theater Corporation which was revealed to be an adults only theater. Similarly, the Capri Book Store owned by Petitioner Bloss is maintained in an "adults only" setting regulated by attendants and required an admission fee even to gain entrance to the establishment. It was further revealed that the

publications could not be clearly viewed from outside the store. (T. 25, 26, 34, 43, 100).

No evidence was produced by the Respondent through any competent witness as to the prurient interest appeal of any person or publication. Similarly the only evidence reflecting upon the community standards was the testimony of the Respondent who applied the local community test. (T. 155, 180). The Respondent did not produce any evidence as to whether the publications contained any redeeming social value yet several of the exhibits editorially cite the magazines use *inter alia* of making photographs of nudes available to those in the arts without live models.

It is not incumbent upon the citizen, in securing those freedoms guaranteed to him by virtue of the *First* and *Fourteenth Amendments* to the *Constitution of the United States*, to affirmatively show that the materials constitute protected expression. But the burden is upon them who seek to suppress the presumptively protected materials to affirmatively show by sufficient competent evidence that the materials are not protected by the Constitution of the United States before the materials can be suppressed, seized and destroyed. This is all the more so where a statute and order precludes the acquisition and the mere possession of publications as in the case at bar.

7. If the statute, *Michigan Statutes Annotated 27A.2938*, is found by this Court to be constitutional upon its face and as applied in the premises, and assuming for the sake of argument that the materials herein meet those tests for obscenity variously prescribed by this Court, then the materials still may not be suppressed absent any evidence that the statute reflects a specific and limited state concern for

juveniles and absent any evidence the materials are disseminated in such a manner as to offend the sensibilities or privacy of an individual wishing to avoid confrontation with them and absent evidence that the materials are not being disseminated only to the willing adult public.

The fountainhead for the definition of obscenity was *Roth v. United States, 354 U.S. 476.* The primary question there was whether obscenity was protected expression under the *First Amendment.* This Court ruled then that it did not. The opinion held the protection was available to all ideas having even "the slightest redeeming social importance." The Court further held that sex and obscenity were not synonymous and that ceaseless vigilence was the watchword to prevent the erosion of freedoms under the Constitution. This Court rejected the older Hicklin test and substituted "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U.S. at 488-489.

The result was that the lower courts as well as this Court and the state courts fought with the application of the *Roth-Alberts* tests. Problems rose as to "community standards," "prurient interest" and "social importance." See *United Artists Corp. v. City of Dallas, 390 U.S. 629; Ginsburg v. U.S., 383 U.S. 463; Memoirs v. Massachusetts, 383 U.S. 4B; Jacobellis v. Ohio, 378 U.S. 184;* and *Redrup v. New York, 386 U.S. 767* and in particular see the concurring and dissenting opinions.

Similarly, problems arose in the application of these tests to the particular materials before the various courts for adjudication. Each obscenity matter before the courts necessarily brought with it *First Amendment* problems. There was no definite and identifiable course to follow that evolved

out of these multiple cases. Rather the path became even more confusing in the light of the multiple reversals based upon *Redrup, supra.* This Court then looked to *Jacobellis v. Ohio, 378 U.S. 184* to bring about order out of chaos by requiring a determination first that the material exceeded the customary limits of candor in the description or representation of sex or nudity. Mr. Justice Brennan urged that the standard to be applied was national in scope. The final clarity set forth was that the matter must be utterly without social importance, 378 U.S. 191.

After only two years the Court was again faced with the same problems. In *Memoirs v. Massachusetts, 383 U.S. 413,* this Court held that after each of the three individual tests were applied it must also be shown that the elements have coalesced although applied independently.

This Court found that even this did not provide the ground rules sufficient to delineate what may or what may not be proscribed. Another case arose, *Redrup v. New York, 386 U.S. 767,* (actually three cases were involved, *Austin v. Kentucky,* and *Gent v. Arkansas*) which was disposed of by reversing the lower court in a *per curiam* opinion. This Court noted the diverse views of the individual justices in trying to determine what material was subject to proscription and in any event held the materials before the Court was protected expression and could not be proscribed by proceedings criminal or civil, *in personam* or in *rem.* It was further noted that in none of the cases was there;

> "a claim that the statute in question reflected a specific and limited state concern for juveniles. See Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L. Ed. 645; Cf. Butler v. State of Michigan, 352 U.S. 380, 77 S. Ct. 524, 1 L. Ed. 2d 412. In none was there any suggestion of an

assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. Breard v. City of Alexandira, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233; Public Utilities Comm'n of District of Columbia v. Pollak, 343 U.S. 451, 72 S. Ct. 813, 96 L.Ed. 1068. And in none was there evidence of the sort of 'pandering' which the Court found significant in Ginzburg v. United States, 383 U.S. 463, 86 S.Ct. 942, 16 L. Ed. 2d 31." (Redrup v. New York; 386 U.S. at 769).

Clearly the implication was that the Court was no longer looking at the materials in and of themselves but rather respected the right to receive and possess together with the right to disseminate under controlled circumstances. No longer was matter obscene by any test precluded from the citizens who desired to have it. The Court in referring to the older *Roth* case stated:

> "It is true that in Roth this Court rejected the necessity of proving that exposure to obscene material would create a clear and present danger of antisocial conduct or would probably induce its recipients to such conduct. 354 U.S., at 486-487, 77 S. Ct., at 1309-1310. But that case dealt with public distribution of obscene materials and such distribution is subject to different objections. For example, *there is always the danger that obscene material might fall into the hands of children, see Ginsberg v. New York, supra, or that it might intrude upon the sensibilities or privacy of the general public.* See Redrup v. New York, 386 U.S. 767, 769, 87 S.C. 1414, 1415, 18 L. Ed. 2d 515 (1967). *No such dangers are present in this case." (89 S.Ct. at 1249, emphasis added).*

The reference by Justice Marshall in *Stanley* to the article by Professor Emerson is of more than passing interest. In that

article, various interests allegedly sought to be protected by restrictions on obscene publications, are examined by the author in the light of the decision in *Roth-Alberts.* Professor Emerson's conclusion is that most of the justifications advanced for the obscenity laws are incompatible with the basic theory of freedom of expression as incorporated in the *First Amendment* and that the rule of the *Roth* case is open to criticism upon these grounds. The author concludes that the only interests which could arguably justify state intervention in this area are, first, "where a shock effect is produced by forcing an 'obscene' communication upon a person contrary to his wishes" or, second, "where the interest at stake is the effect of erotic expression upon children." 72 Yale L.J. at 938-939.

This Court reversed multiple cases arising from the lower courts in *per curiam* opinions based upon the *Redrup* holding. It would appear that there was evolving a clearer path for the Courts to follow in obscenity litigation. Consenting adults were entitled to receive materials for their private possession and perusal irrespective whether other members of the community may not be so inclined. The pattern of dissemination then became the focusing feature. The thesis was advanced by lower courts that adults were entitled to receive and conversely the material had to be disseminated to them in order for the consenting adults to so receive and possess. It was in the manner of dissemination that regulation should be enforced. In the absence of dissemination to juveniles and in the absence of intrusion upon the sensibilities of an individual wishing to avoid confrontation with it, the materials should prevail and be available to those adults whishing to receive them. See for example *Grant & Wissman v. United States, 380 F.2d 748* (9 Cir. 1967).

On April 7, 1969 this Court in decision of paramount importance came to grips with the problem once again and

upheld the right to private possession of *First Amendment* materials irrespective whether they were "hard-core" pornography in the matter styled *Stanley v. Georgia, 89 S. Ct. 1243, 22 L ed 2d 542.* Mr. Justice Marshall stated:

> "We do not believe that this case can be decided simply by citing *Roth.*
>
> . . .
>
> "It is now well established that the Constitution respects the right to receive information and ideas . . . This right to receive information and ideas regardless of their social worth . . . is fundamental to our free society."

There were no dissenting opinions in the *Stanley* decision.

As was stated by Mr. Justice Douglas in *Griswold v. Connecticut, 381 U.S. 479:*

> " . . . (T)he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. *The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . . Without those peripheral rights the specific rights would be less secure." (Emphasis supplied).*

One, who has the constitutional right to possess "obscene" material and the right to receive it, of necessity must have the right to purchase the materials. It cannot be argued that the right to read a book or newspaper is secure and by statute preclude the sale or dissemination of the same publications. These same citizens cannot be required to obtain the materials illegally in order to lawfully possess them.

The conclusion in logic then is that, absent dissemination to juveniles contravening a statute reflecting a limited and specific state concern for juveniles and the foisting upon the sensibilities of an unwilling individual in a manner that the individual cannot avoid confrontation with it, the materials herein are protected expression and cannot be suppressed from dissemination to consenting and willing adults. The record and pleadings clearly disclose that the dissemination herein was conducted in a controlled adults only environment and in no way violated the principles set forth herein necessary to bring about suppression.

In further elaboration of this type of approach to proceedings by states for alleged enforcement of state obscenity statutes, the United States District Court for the District of Massachusetts, in an opinion filed on November 28, 1969, by a Three-Judge Court, in a case styled *Karalexis v. Byrnes, Civil Action No. 69-665-J* stated:

> "We are asked to rule that this decision (*Stanley v. State of Georgia*) 1969, *394 U.S. 557* extends to a case where the possessors permitted a number of consenting adults or, more exactly, paying adult members of the public, to view their possibly obscene picture in a moving picture house.
>
> * * * * * * *
>
> "The following facts appear by stipulation of counsel or otherwise. Plaintiffs (Motion picture operator) have sufficiently indicated to the viewing public the possible offensiveness of the film, so that no patron will be taken unawares and his sensibilities offended. On the other hand, the film is not advertised in any pandering manner within the stricture of *Ginsburg v. United States,* 1966, *383 U.S. 363.* Finally, it is conceded that the theatre is policed, so that no minors are permitted to enter.

"For the purposes of this case we assume that the film is obscene by standards currently applied by the Massachusetts Courts.

* * * * * * *

"The question is, how far does Stanley go. Is the decision to be limited to the precise problem of mere private possession of obscene material, (394 U.S. at 561; is it the high water mark of a past flood, or is it the precoursor of a new one?"

* * * * * * *

"In recognizing that public distribution differed from private consumption, the Court in Stanley gave two examples. In the case of public distribution, 'obscene material might fall into the hands of children . . . .or . . . it might intrude upon the sensibilities or privacy of the general public'. 394 U.S. at 567. To these examples, which were the extent of the Court's discussion, it can be said, equally with Stanley, 'No such dangers are present in this case.''

* * * * * * *

"We think it probable that *Roth* remains fully intact only with respect to public distribution in the full sense, and that restricted distribution, adequately controlled, is no longer to be condemned."

The Court thereafter went on to say:

"If a rich Stanley can view a film, or read a book, in his home, a poorer Stanley should be free to visit a protected theatre or library. We see no reason for saying he must go alone."

Under the rationale suggested by the cases quoted herein, none of the challenged materials before this Court in the premises can or should be declared obscene and without the

protection of the *First Amendment* unless it can be shown that the Respondents in their dissemination have abused and intruded on the rights of others.

In 1968, the Congress of the United States in Public Law 90-100, established an advisory commission to study obscenity and the laws, and make recommendations. This commission is called the *Commission on Obscenity and Pornography.* It has recently issued its progress report, and the legal panel after reviewing recent case law regarding obscenity and pornography for guidelines concerning permissible legislative action reported on page 3:

> "Constitutional precedents suggest three primary directions for effective legislative action to control erotic materials: 1) statutes with specific concern for juveniles; 2) statutes dealing with assaults upon individual privacy and offensive public displays; 3) statutes prohibiting pandering."

Under the leading legal theory nationally prevalent, the materials before the Court are not obscene in the constitutional sense as a matter of law.

CONCLUSION

It is respectfully submitted that the statute (*Michigan Statutes Annotated 27 A. 2938*) is unconstitutional as written for failure to properly define what is proscribed. Additionally the statute is facially void in that it prohibits the mere private possession of publications and protected forms of expression. The *Ex parte* Injunctive provisions are likewise void in that they provide no safeguards to protect any expression, legitimate or otherwise, and do not require any participation by the disseminator before *First Amendment* protection is circumscribed.

In its application the statute is defective for not first affording an adversary hearing or even the giving of notice until the Injunctive Order issued. The Respondent's actions in utilizing this statute by summarily searching and seizing vast quantities of publications beyond the *ex parte* Injunction are not before this Court because the suppression order for those materials was reversed on appeal. The order validating that seizure and the order for destruction would have remained in force had not the Court of Appeals reversed the judgment of Judge Letts.

The materials at issue herein are similar to other publications held not obscene and constitute protected forms of freedom of speech and press. It is respectfully submitted that the declaration of obscenity for these materials together with the sweeping injunctive order issued under the facially void statute violates the Petitioners protected rights of freedom of speech and press, and that the judgment of the Courts of Michigan should be vacated. The denial of the Petitioners rights is tantamount to the denial of the same rights to others who have an interest in the unfettered possession, acquisition and distribution of these presumptively protected magazines, disseminated to adults only herein, under non-obstrusive circumstances, absent evidence of the sort of pandering deemed by this Court to be significant in *Ginzburg v. U.S. supra.*

For the foregoing reasons, it is respectfully requested that this Petition for a Writ of Certiorari be granted.

For the foregoing reasons, it is respectfully requested that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Of Counsel

March 1970

APPENDIX A.

Summons

IN THE NAME OF THE PEOPLE
OF THE STATE OF MICHIGAN:

To the above named defendants Floyd Bloss and the Kent County Theater Corporation:

You are hereby notified that a civil action has been commenced against you, and that if you desire to defend the same, you are required to answer or take such other action as may be permitted by law with regard to the complaint herewith served upon you, within 20 days after service of this summons and complaint upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

JACK BRONKEMA,
County Clerk.

Complaint

The plaintiff says:

1. That he is the duly appointed City Attorney of the City of Grand Rapids, Michigan and by virtue of such appointment is head of the Legal Department of the City of Grand Rapids.

2. That the Kent County Theater Corporation is a corporation organized and existing under the laws of the State of Michigan, and that as plaintiff is informed and believes, defendant Floyd Bloss is the President and Principal and/or sole stockholder of said corporation.

3. That Floyd Bloss is a resident of Barry County, Michigan and operates the Capri Book Store and Library at 303 S. Division Ave., in the City of Grand Rapids, Michigan, either under the form and style of the Kent County Theater Corporation or in some other capacity.

4. That plaintiff brings this action pursuant to Section 2938 of Act 236 of the Michigan Public Acts of 1961, as amended, being M.S.A. 27 A 2938.

5. That Officer Michael Jennings of the Grand Rapids Police Department, purchased from the Capri Book Store and Library at 303 Division, S.E., Grand Rapids, Michigan on March 7, 1968 at approximately 11 A.M. the following described obscene books and magazines, which books and magazines are submitted as Exhibits:

1. Cover Girl – Exhibit A

2. Pinned – Exhibit B

3. Missie – Exhibit C

4. Jaybird Photographer No. 9 – Exhibit D.

6. That the Complainant has carefully reviewed each of the books and magazines marked as Exhibits A through D and finds the same to be obscene within the definition of that term as defined by the U.S. Supreme Court.

WHEREFORE Plaintiff prays:

1. That the defendants and their agents, employees, officers and servants, persons in active concert or participation with them, be temporarily restrained and enjoined from the further sale, distribution, acquisition or possession of Exhibits A, B, C or D, or copies thereof, pending a hearing on said Complaint.

2. That a hearing to show cause and/or trial on the merits be had on this complaint within one day after joinder of issue in accordance with the applicable statute.

3. That Exhibits A, B, C and D be declared obscene and the defendants and their agents, employees, officers and servants, persons in active concert or participation with them be permanently enjoined from the further sale, distribution, acquisition or possession of Exhibits A, B, C or D, or copies thereof, and

4. Upon entry of a final Order or Judgment of Injunction of the Court that the Sheriff be directed to seize and destroy all Exhibits held by the court to be obscene and any copies thereof.

5. That the Court grant such additional and further relief as may be just and equitable.

Steven L. Dykema,
City Attorney of the
City of Grand Rapids,
Michigan

Affidavit of Officer
Michael Jennings

STATE OF MICHIGAN)
COUNTY OF KENT) SS.

Michael Jennings, being duly sworn, deposes and says that he is a Police Officer of the Grand Rapids, Michigan Police Department and that on the 7th day of March 1968 at approximately 11 A.M. he purchased from the Capri Book Store and Library at 303 Division Ave. S., Grand Rapids, Michigan the following described books and magazines:

1. Cover Girl + Exhibit A.

2. Pinned – Exhibit B.

3. Missie – Exhibit C.

4. Jaybird Photographer No. 9 – Exhibit D.

Deponent further says that these books and magazines were purchased from open racks within the store for which other copies of the same books were also displayed for sale.

Deponent further says that the books and magazines attached hereto and marked Exhibits A through D are the same books and magazines referred to above.

Michael Jennings

Temporary Restraining Order and Notice of Hearing

At a session of said Court, held in the Hall of Justice, in the City of Grand Rapids, Michigan on the 7th day of March 1968.

Present: Honorable John T. Letts, Circuit Judge.

On Motion of Plaintiff, Steven L. Dykema, City Attorney of the City of Grand Rapids, and based upon the verified Complaint of Plaintiff and the Affidavid of Officer Michael Jennings and Exhibits A, B, C, and D filed herewith,

IT IS HEREBY ORDERED that Defendants, Floyd Bloss and the Kent County Theater Corporation, and their Officers, Agents, Employees and Servants, Persons acting in active Concert or participation with them, or those who receive actual notice of this Order by personal service, or otherwise, and each and all of them, be and they are hereby restrained from the sale, distribution, acquisition or possession of the following described books and magazines and any copies thereof:

1. Cover Girl – Exhibit A.

2. Pinned – Exhibit B.

3. Missie – Exhibit C.

4. Jay Bird Photographer No. 9 – Exhibit D.

Photostatic copies of the front pages of each book and/or magazine are attached to this Order and made a part hereof.

This Order is issued pursuant to Section 2939 of Act 236 of the Michigan Public Acts of 1961, as amended, being M.S.A. 27 A 2938.

IT IS FURTHER ORDERED that the above named defendant Floyd Bloss and the Kent County Theater Corporation, show cause before this court on the 8th day of March 1968, at 4:00 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, at the Hall of Justice in the City of Grand Rapids, in said County of Kent, Michigan why the restraining order should not continue during the pendency of said suit, and to determine when the issues shall be tried.

JOHN T. LETTS,
Circuit Judge

Date and Hour of Issuance
March 7, 1968 5:15 P.M.

APPENDIX B.

Answer to Complaint

NOW COME Defendants and for answer to the Complaint say as follows:

1) Admit same.

2) Admit same.

3) Answering Paragraph Three, admit that Floyd Bloss is a resident of Barry County, Michigan, and that he operates the Capri Bookstore and Library in the City of Grand Rapids, denying, however, that Kent County Theater Corporation has any connection therewith, affirmatively stating that the bookstore is owned and operated solely and exclusively by Floyd Bloss individually.

4) Answering Paragraph Four, neither admit nor deny same, but leave Plaintiff to his strict proofs as to the form of the proceeding and the statutory authority therefore.

5) Answering Paragraph Five, neither admit nor deny for want of sufficient information or knowledge on which to base an answer that Michael Jennings is a member of the Grand Rapids Police Department; neither admit nor deny for want of sufficient information, knowledge, or belief on which to base an answer that he purchased from Capri Bookstore and Library on March 7 the magazines referred to as Exhibits A, B, C, and D; in further answer to said Paragraph Five, deny that the matters referred to as Exhibits A, B, C, and D are obscene and state that the assertion that they are obscene is a legal conclusion on the part of the Plaintiff herein without any factual basis or foundation therefore and therefore moves the Court to strike said allegations.

6) Deny same; state affirmatively that the said magazines are not obscene and that they are protected under the First

and Fourteenth Amendments of the United States Constitution and Article 1, Section 5, of the Constitution of the State of Michigan.

AFFIRMATIVE DEFENSES AND NEW MATTERS

By way of Affirmative Defenses and New Matters, Defendants say as follows:

1) That the Kent County Theater Corporation is not engaged in the sale of books, magazines, newspapers, or any other type of printed or typewritten or written matters of expression but is engaged solely in the operation of a motion picture theater.

2) That the magazines referred to as Exhibits A, B, C, and D in Paragraph Five of the Complaint filed herein are not as a matter of law obscene; that said Exhibits are matters of free speech and expression guaranteed to all citizens of the United States under the First and Fourteenth Amendments to the United States Constitution and Article 1, Section 5, of the Constitution of the State of Michigan.

3) That Paragraphs Five and Six of the Complaint filed herein alleging exhibits A, B, C, and D to be obscene are conclusions of law and not statements of factual matters as required under the Court Rules and thus ought to be dismissed and Defendants move that the same be dismissed and will so move at the trial of said cause.

4) That the statute under which the present action is brought is unconstitutional as being overly broad and vague and more particularly Defendants allege that:

a) Section 1 is overly broad and vague in that it seeks to outlaw in violation of rights guaranteed under the First and Fourteenth Amendments of the United

States Constitution and Article 1, Section 5 of the State Constitution matters which are referred to in the statute as "filthy", "indecent", and "disgusting"; that such matters do not fall within the definition of obscenity and the criteria for determination of obscenity as laid down by the United States Supreme Court.

b) That Section 2 makes the so-called Chief Legal Officer of the City, Township, County, or Village a "censor" without any legal or constitutional qualifications therefore; that the burden of proving that the matters sought to be sold are constitutionally protected is placed on the shoulders of the one who seeks to exercise rights guaranteed to him under the First and Fourteenth Amendments of the United States Constitution and Article 1, Section 5 of the State Constitution.

c) That Section 2 thereof is unconstitutional and more particularly sub-section "d" thereof in that it constitutes a prior restraint on the right of free expression guaranteed under the First and Fourteenth Amendments of the United States Constitution and Article 1, Section 5 of the State Constitution.

WHEREFORE, Defendants pray as follows:

1) That the Court will dismiss the Kent County Theater Corporation as a party Defendant hereto.

2) That the Court will declare the statute, and more particularly those portions thereof referred to in the Affirmative and New Matters hereinabove set fourth unconstitutional.

3) That the prayer for relief will be denied and the Complaint dismissed.

Dated this 12th day of March, 1968.

John W. Piggott,
Attorney for Floyd Bloss,
Defendant

APPENDIX C.

Amended Complaint

Now Comes Steven L. Dykema, City Attorney of the City of Grand Rapids, Michigan and amends the Complaint heretofore filed in the above captioned matter by the addition of the following Counts:

Count II.

The Plaintiff says:

1. That he is the duly appointed City Attorney of the City of Grand Rapids, Michigan and by virtue of such appointment is head of the legal Department of the City of Grand Rapids.

2. That the Kent County Theater Corporation is a corporation organized and existing under the laws of the State of Michigan, and that as plaintiff is informed and believes, defendant Floyd Bloss is the President and Principal and/or sole stockholder of said corporation.

3. That Floyd Bloss is a resident of Barry County, Michigan and operates the Capri Book Store and Library at 303 S. Division Ave., in the City of Grand Rapids, Michigan, either under the form and style of the Kent County Theater Corporation or in some other capacity.

4. That plaintiff brings this action pursuant to Section 2938 of Act 236 of the Michigan Public Acts of 1961, as amended, being M.S.A. 27A.2938.

5. That on March 7, 1968, plaintiff filed the above captioned matter in the Kent County Circuit Court and secured a temporary restraining order from the Court restraining defendants from the sale, distribution, acquisition

or possession of four (4) named and described books and magazines.

6. That on March 7, 1968, at approximately 6:15 P.M. plaintiff and officer William VanTuinen of the Grand Rapids Police Department went to the Capri Book Store and Library at 303 S. Division Ave. in the City of Grand Rapids, Michigan, to serve the Summons, Complaint and Restraining Order and Notice of Hearing in the above captioned matter and while serving defendants' agent and servant at said address observed the following books and magazines on open shelves and on open display for sale to the public:

1. Governess – Exhibit E.
2. Michelle No. 1 – Exhibit F.
3. Honey No. 1 – Exhibit G.
4. Duchess – Exhibit H.
5. Luv – Exhibit I.
6. Pretty Girl No. 1 – Exhibit J.
7. Suzette – Exhibit K.
8. Countess – Exhibit L.
9. Bunny No. 1 – Exhibit M.
10. Nudist Form No. 1 – Exhibit N.
11. Femmes No. 1 – Exhibit O.
12. Baroness – Exhibit P.
13. Nudist No. 1 – Exhibit Q.
14. Wonderful Girl No. 1 – Exhibit R.
15. Exciting Nos. 12, 13, 14, 15, 16, 17 and 2 unnumbered issues – Exhibit S.
16. Revue – Exhibit T.
17. Secret – Exhibit U.
18. Lesbian – Exhibit V.
19. Underground No. 2 – Exhibit W.
20. Teddy Boys No. 1 – Exhibit X.
21. Stag No. 2 – Exhibit Y.
22. Cover Girl NOs. 12, 13, 14, 15, 19 and 1 unnumbered issue – Exhibit Z.

7. That officer William VanTuinen and Inspector Frances Pierce of the Grand Rapids Police Department and your deponent carefully reviewed and examined each of the above named books and magazines, marked as Exhibits E through Z and found the same to be obscene and your deponent did then and there advise said officer Van Tuinen and Inspector Pierce that said books and magazines were obscene.

8. That said officer VanTuinen and Inspector Pierce thereupon seized said books and magazines.

WHEREFORE Plaintiff prays:

1. That the defendants and their agents, employees, officers and servants, persons in active concert or participation with them, be temporarily restrained and enjoined from the further sale, distribution, acquisition or possession of Exhibits E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y and Z, or copies thereof, pending a hearing on said Complaint.

2. That a hearing to show cause and/or trial on the merits be had on this complaint within one day after joiner of issue in accordance with the applicable statute.

3. That Exhibits E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y and Z, be declared obscene and the defendants and their agents, employees, officers and servants, persons in active concern or participation with them be permanently enjoined from the further sale, distribution, acquisition or possession of Exhibits E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y and Z, or copies thereof, and

4. Upon entry of a final Order or Judgment of Injunction of the Court that the Sheriff be directed to seize and destroy all Exhibits held by the Court to be obscene and any copies thereof.

5. That the Court grant such additional and further relief as may be just and equitable.

/s/ STEVEN L. DYKEMA,
City Attorney of the
City of Grand Rapids, Michigan

SECOND AMENDED COMPLAINT

Now comes Steven L. Dykema, City Attorney of the City of Grand Rapids, Michigan, and amends the Complaint and Amended Complaint heretofore filed in the above-captioned matter by the addition of the following paragraph, Paragraph 9, to Count II of the Amended Complaint:

9. That on or about March 7, 1968, defendants did possess, offer for sale, and did sell and cause to be sold at the Capri Book Store and Library at 303 S. Division Ave., in the City of Grand Rapids, Michigan, the following obscene books and magazines which were on open display to the public:

Cover Girl – No. 12
Cover Girl – No. 15
Cover Girl – No. 1[redacted]
Exciting – No. 19
Exciting – No. 14
Exciting – No. 13
Cover Girl – No. 19
Cover Girl – No. 20
Gigi.

/s/ STEVEN L. DYKEMA,
City Attorney of the
City of Grand Rapids, Michigan.

APPENDIX D.

Opinion

This action is brought under the provisions of C.L. 1948, Section 600.2938 (Stats. Ann. 27 A.2938). It is one of several statutes of the State of Michigan relating to the problem of obscene literature. Other statutory provisions relating to obscenity are found in C.L. 1948: Sections 750.343 a; b; c; d; and e (Stats. Ann. 28.575 (1); (2); (3); and (4).

This action was commenced by way of a complaint, executed by Steven L. Dykema, the City Attorney for, and the chief legal officer of, the City of Grand Rapids, Michigan.

The defendant, Floyd Bloss, is the owner and operator of the Capri Book Store & Library at 303 South Division Avenue in the City of Grand Rapids, Michigan. The defendant's employees are in charge of and in control of this book store and library during the physical absence of the owner.

The defendant is also the principal stockholder of and/or in control of the Kent County Theater Corporation which also operates the Capri Theater located on Division Street about a block or a three minute walk from the Capri Book Store.

The Capri Book Store is located immediately adjacent to the office of the Michigan Department of State License Bureau, which occupies the same alcove and the area is frequented by the public. There are other commercial establishments in the same area, as well as the Catholic Central High School which is located across the street from said book store.

A portion of the interior of the Capri Book Store can be seen from the outside entrance.

It is revealed that the patrons of the Capri Theater are subjected to various forms of advertising, primarily "trailers" or commercial advertising on the screen of the theater, informing said patrons to visit the Capri Book Store & Library after the show. In addition to said "trailers," magazines of the type and kind that are on sale at the Capri Book Store are displayed in the lobby of the Capri Theater for examination by the patrons of the theater. The magazines, including editions of "Cover Girl," are displayed under a sign with the legend:

"This Product is available at the Capri Book Store & Library at 303 S. Div." (Exhibit 16)

There was unrebutted testimony that the Capri Book Store & Library does not possess, display or sell standard, recognized periodicals. All merchandise apparently treats of and deals with sex, both male and female, both sexes in their nude state prominently displayed on three walls on the covers of the magazines.

Defendant Floyd Bloss admitted that he was generally familiar with the contents of the magazines which he had on display but could not read the print in one because it was in the Swedish language.

The court finds, after listening to the testimony, that each magazine comprising an exhibit (Exhibits 1 – 15 and 19) in this case was prominently displayed on a magazine rack and the cover of each magazine portrays sex in some lurid, morbid or enticing manner so as to invite further examination of its contents.

(There was a motion to dismiss plaintiff's amended complaint which covered that material referred to as Exhibit No. 19. The court will dispose of that matter in its conclusions of law.)

Generally speaking, most of the magazines, especially the editions of "Cover Girl" and "Exciting", are dominated by photographs of nude or near-nude women in various sexual poses. These photographs often depict: The model on a bed or a bed is part of the picture; the model is in an enticing or lewd position such as a position of sexual intercourse; the pubic area is bare and such clothing as the women wear tends to accentuate the focus on the pubic area; i.e. silk stockings and garter belt; the model's pose accentuates the pubic area, i.e. the vagina is open; the model removes her clothing in a series of pictures suggestively; properties such as beds, stools, veils, chairs and clothing are used in such a way as to heighten prurient interest.

The background for the commencing of this action, as related through testimony of witnesses, was as follows:

The Mayor of the City of Grand Rapids came into possession of a magazine purchased at the Capri Book Store and thereafter turned it over to the city attorney and complainant in this action, Steven L. Dykema. The city attorney made an examination of the magazine and forthwith requested a member of the Grand Rapids Police Department, Officer Michael Jennings, to make a purchase of Exhibits 1, 2, 3 and 4, at some hour during the morning of March 7, 1968, at the Capri Book Store.

The purchased magazines were then examined by the city attorney, a literary expert and officers of the vice-squad and Officer Jennings to determine whether the magazines were "obscene" as measured by the test required in the Roth case, and as further spelled out in subsequent Supreme Court decisions.

There is no doubt that the city attorney is a qualified attorney who has done considerable research in the field of law involving "obscenity," and drafted the Grand Rapids City Ordinance (Exhibit 18) relating to that subject.

Thereupon the city attorney drafted and presented to this court a complaint under Stats. Ann. 27A 2938 concerning the sale of Exhibits 1, 2, 3 and 4, their obscenity, and requesting a temporary restraining order, a show cause hearing and/or trial, a permanent injunction and that the exhibits be held obscene and ordered destroyed. Thereafter certain amendments were made to the complaint embracing the remainder of the books and magazines which are exhibits in this proceeding.

Exhibit 3, "Cover Girl No. 16" has been translated from Swedish to English and the translation is before the court in Exhibits 23a, 23b, 23c and 23d.

This court after taking sworn testimony from Officer Jennings as to the sale, and after reviewing the pleadings, Exhibits 1, 2, 3 and 4, and after reviewing the applicable statute (Stats. Ann. 27A 2938) issued a temporary restraining order as to the four exhibits and set a show cause hearing for the following day at 4 p.m. Subsequently at the request of defendant's attorney this hearing and the trial were set over to the following Friday, March 15, 1968.

Following the issuance of the temporary restraining order the city attorney accompanied Officer William VanTuinen from the Grand Rapids Police Department to the Capri Book Store to serve the pleadings and temporary restraining order. After the officer served the papers on the person in charge of

the Capri Book Store, the city attorney noticed a large number of magazines openly displayed on a wall, approximately ten feet from where he was standing, including several editions of "Cover Girl" and "Exciting". Testimony was had to the effect that these magazines were all displayed on open book shelves for inspection by and sale to the public and the covers of each depicted a female with breasts and pubic area fully exposed, usually attired in a garter belt, silk stockings, with large amounts of pubic hair exposed, and often situated upon a bed. The city attorney, along with Officer VanTuinen, walked over to these book shelves and started examining these magazines and made a determination that those he had examined were obscene. At this point the city attorney telephoned Inspector Francis Pierce of the Grand Rapids Police Department and asked him to contact the prosecuting attorney's offices for the purposes of securing a search warrant. Inspector Pierce later arrived at the store and advised the city attorney that if the magazines were obscene and were on sale to the public no search warrant was required. Thereupon the city attorney and Officer VanTuinen and Inspector Pierce carefully reviewed and examined each of the magazines contained in Exhibit 19 (Exhibits 1–17 and 20–22 of Plaintiff's first amended complaint). Each of the three individuals examining the magazines determined them to be obscene and the city attorney advised the two police officers that in his opinion the magazines were obscene. The city attorney and the two police officers also examined other magazines that were for sale but determined that although all dealt with nudity that they were not in the obscene classification. The magazines designated in Exhibit 19 were then taken by the police officers to police headquarters after the employees of the Capri Book Store had made a record of the magazines being taken.

The following magazines and exhibits were purchased at the Capri Book Store on or about March 7th, 1968, by several police officers and one other individual:

Exhibit 5	Cover Girl No. 12
Exhibit 6	Cover Girl No. 15
Exhibit 7	Cover Girl No. 13
Exhibit 8	Cover Girl No. 19
Exhibit 9	Exciting No. 14
Exhibit 10	Exciting No. 13
Exhibit 11	Exciting No. 14
Exhibit 12	Cover Girl No. 19
Exhibit 13	Cover Girl No. 15
Exhibit 14	Cover Girl No. 20
Exhibit 15	Gigi

Some of the magazines carry an editorial comment to the effect that they are art magazines, exclusively for use in furnishing serious artists and persons interested in art, who have some difficulty to find living models, with suitable photographs to be used as substitutes for drawing, painting and sculpturing. The court finds these claims are spurious and that the magazines involved are designed for and intended to be distributed to persons who may have a natural or prurient interest in pictures of nude women in various sexual poses.

The court finds that the exhibits in question are patently offensive because each affronts contemporary community standards relating to the description or representation of sexual matters regardless of whether a national, statewide or local community standard is applied in determining the "contemporary community standards."

CONCLUSIONS OF LAW

That obscenity is not within the area of protected speech and press was firmly settled by the United States Supreme Court in *Roth v. United States*, 354 U.S. 476, 1 L ed. 2 d 1498, 77 S.Ct. 1304 (1957). In *Roth* the court said at pages 1505–1507:

> "The guaranties of freedom of expression in effect in 10 of the 14 States which by 1792 had ratified the Constitution, gave no absolute protection for every utterance. Thirteen of the 14 States provided for the prosecution of libel, and all of those States made either blasphemy or profanity, or both, statutory crimes. As early as 1712, Massachusetts made it criminal to publish 'any filthy, obscene, or profane song, pamphlet, libel or mock sermon' in imitation or mimicking of religious services. Acts and Laws of the Province of Mass. Bay, c. CV, § 8 (1712), Mass. Bay Colony Charters & Laws 399 (1814). Thus profanity and obscenity were related offenses.
>
> "'* * * There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. *These include the lewd and obscene * * * It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality * * *.*' (Emphasis added.)
>
> "We hold that obscenity is not within the area of constitutionally protected speech or press."

Obscene literature, whether set forth pictorially, caricature, photograph or written material, is not entitled to the protection of the First Amendment. Roth v. United States, supra.

This court adopts and follows the "Roth test" at least preliminarily, in arriving at a decision as to whether the exhibits before this court are obscene, viz., whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest. *Roth v. United States*, supra. Under this definition, as elaborated in subsequent cases, three elements must coalesce: It must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value. *Memoirs v. Massachusetts*, 383 U.S. 413, 16 L.ed.2d 1, 86 S.Ct. 975.

In *United States v. 25,000 Magazines, Entitled "Revue,"* 254 F. Supp. 1014 (1966), the following language is pertinent to this case:

> "(2) A. Not all photographs of nude women are obscene, even though the focus is on the breasts or the pubic area. Such photographs are not rendered obscene merely because the models are kneeling or lying down, or handling scarves, veils or other properties, or posed in unusual or vulgar positions, if their positions and expressions are not lewd or enticing. The inclusion of a nude man or men in such photographs does not render them obscene unless some type of sexual activity is depicted or suggested.

"(3) B. Among the factors which may render such photographs obscene and which should be considered by enforcement authorities are: (1) that the model is on a bed or a bed is part of the picture; or (2) that the woman is in an enticing or lewd position; or (3) that the pubic area is bare and such clothing as the woman wears tends to accentuate the focus on the pubic area; or (4) that the pose overaccentuates the pubic area; or (5) that the woman is removing her final garment suggestively; or (6) that properties are used in such a way as to heighten prurient interest; or (7) that a man in the picture has an erection or a partial erection or any type of sexual activity is suggested or depicted.

"(4) The dominant theme of the material taken as a whole must be considered, but one or more obscene photographs may heighten the prurient appeal of other photographs in such a magazine."

Under the standards so set forth this court finds each and every one of the exhibits (Exhibits 1–15 and 19) to be disgusting, morbid and obscene. Each of said exhibits meet each of the prescribed tests. This court finds no social redeeming value or purpose in the publication or distribution of any of the exhibits (1–15 and 19) and finds that the sole and only motivation to be the exploitation of sex in its most disgusting form.

In addition to the determination of obscenity under the Roth test, this court finds that as to each of the said exhibits the defendant Floyd Bloss has been in the business of purveying both textual and graphic matter openly advertised to appeal to the erotic or prurient interest of his customers, that is, the sordid business of pandering as defined in Ginzburg v. United States, 383 U.S. 463, 16 L. ed. 2d 31, 86 S.Ct. 536.

There was no search involved so far as the magazines in Exhibit 19 are concerned. A search implies a prying into hidden places for that which is concealed and it is not a search to observe that which is open to view, especially in a public place. *People v. Cattaneo*, 126 NE 2d 692; Ellison v. United States, 206 F 2d 4767 People v. Reshes, 242 NYS 2d 416.

The court further finds that the seizure of the magazines composing Exhibit 19 by Officer VanTuinen and Inspector Pierce on March 7, 1968, was proper. United States v. Peisner, 311 F 2d 94 (1962). In the United States v. Peisner case, supra, the United States Court of Appeals for the Fourth Circuit said at pp 1210–1211 (of 5 ALR 3d 1196):

> "Though safeguards are necessary to protect the products of a free press in accord with the dictates of the First Amendment, we are not prepared to say that there must have been a prior determination of obscenity by a judicial officer to constitute probable cause for a search for and seizure of particular publications thought to be obscene. However, as a minimal requirement, we deem it essential that some qualified individual, aware of the proper test of obscenity as formulated and announced in Roth v. United States, supra, should have made a determination prior to search and seizure that a particular publication meets the test. In order to make such a determination, one must have read the whole or, at least, a very substantial portion of the suspected publication, not merely a few sentences, paragraphs or pages selected at random. If law enforcement officers have reasonable cause to believe that certain specific publications are obscene and are located in the place to be searched, a factual base offered to justify a search without a warrant must be sufficiently strong to support the issuance of a search warrant."

See also *People v. Cattaneo*, supra; *People v. Reshes*, supra; and *State v. Vollmar* (Mo.) 389 SW 2d 20.

The Michigan statute under which this proceeding was instituted is as follows (only those sections pertinent to this action are cited):

> "Section 27A.2938 Proceedings relating to sale, distribution, possession or acquisition of obscene literature, pictures or objects.)
>
> "Sec. 2938 (1) The chief executive or legal office of any city, village or charter township or prosecuting attorney of the county may institute and maintain an action in the circuit court against any person, firm or corporation to enjoin and prevent the sale or further sale or the distribution or further distribution or the acquisition or possession of any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure or image or any written or printed matter of an indecent character, which is obscene, lewd, lascivious, filthy, indecent or disgusting, or which contains an article or instrument of indecent or immoral use or purports to be for indecent or immoral use or purpose. * * * *
>
> "(4) A preliminary injunction or restraining order may be issued upon or at any time after the filing of the complaint. The person, firm or corporation sought to be enjoined is entitled to a trial of the issues within 1 day after joinder of issue and a decision shall be rendered by the court within 2 days of the conclusion of the trial.
>
> "(5) If a final order of judgment of injunction is entered in favor of such officer of the city, village or charter township and against the person, firm or corporation sought to be enjoined, the final order or judgment shall contain a provision directing the

person, firm or corporation to surrender to the sheriff of the county in which the action was brought any of the matter described in (1) and the sheriff shall be directed to seize and destroy the same."

* * * * *

Defendants allege that the statute under which the present action is brought is unconstitutional as being overly broad and vague, that the statute is an invalid prior restraint, and that it places an unfair burden on defendants. Defendats' constitutional objections to the statute *(Stats. Ann. 27A.2938)* are not well founded. The statute is closely modeled after Sec. 22-A of the *New York Code of Criminal Procedure* which was upheld by the United States Supreme Court in *Kingsley Brooks v. Brown*, 354 U.S. 436, 1 L ed. 2d 1469, 77 S.Ct. 1325, the same day as the landmark case of *Roth v. United States*, supra, was decided. The court finds the statute in question to be constitutional as well as the procedure employed by the plaintiff. See also *Roth v. United States*, supra.

Defendants claim certain insufficiencies in the complaint. Plaintiff alleges in his complaint that certain exhibits are "obscene." Defendants contend the allegations are conclusions of law and not statements of factual matters as required under the Court Rules. Defendants' claims are without merit. See *People v. Gerardin*, 1 Mich. 90, and People v. Kratz, 230 Mich. 334. In the instant case the complaint is clear as to what specific publications are objected to, and the allegations of obscenity clearly puts the defendants on notice and advises them specifically of the claims being made by the plaintiff.

Defendants have called the court's attention to Redrup v. State of New York, 87 Sup. Ct. Reports 1414 (1967) which was decided May 8, 1967, along with two companion cases which I need not mention here, but it said at page 1415:

> In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L. Ed. 645; cf. Butler v. State of Michigan, 352 U.S. 380, 77 S.Ct. 524, 1 L. Ed. 2d 412. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. Breard v. City of Alexandria, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233; Public Utilities Comm'n of District of Columbia v. Pollak, 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068. And in none was there evidence of the sort of 'pandering' which the Court found significant in Ginzburg v. United States, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed. 2d 31."

The court agrees that in this case the statute, MSA 27A.2938, does not refer to concern for juveniles. There is, however, no question in the court's mind that there was evidence of "pandering" on the part of the defendant in the sale of these magazines.

The court is of the opinion that the *Redrup* case, supra does not set up sufficient guide lines for a trial judge to determine the "yardstick" of measurement for obscenity other than those enunciated most clearly in *Roth* (supra) and again in *Ginzburg* (supra).

The court further finds the remaining objections of the defendants to be without merit.

Therefore, an order and injunction may enter in accordance with these findings of fact and conclusions of law, permanently restraining and enjoining defendants, their agents, attorneys, employees, officers and servants, persons in active

concern or participation with them, or those who receive actual notice of this order by personal service or otherwise, and each and all of them, from the further sale, distribution, acquisition or possession for sale, display or distribution of Exhibits 1–15 and 19, including additional copies of the same editions of these publications.

An order may further enter directing the defendants, their agents, attorneys, employees, officers and servants, persons in active concern or participation with them, to surrender to the Sheriff of this County Exhibits 1–15 and 19, and including additional copies of the same editions of these publications, and said Sheriff hereby is directed to seize and destroy the same.

/s/ JOHN T. LETTS
Circuit Judge

JUDGMENT AND INJUNCTION

This Court having heretofore made and filed its findings of fact and conclusions of law in the above entitled action determining among other things that Exhibits 1–15 and 19 and obscene and that a permanent injunction should issue, and the Court being fully informed in the premises,

IT IS ORDERED AND ADJUDGED that the defendants, their agents, attorneys, employees, officers and servants, persons in active concert with them, or those who receive actual notice of this order by personal service or otherwise, and each and all of them, to and they are hereby permanently restrained and enjoined from the further sale, distribution, acquisition or possession for sale, display or distribution of Exhibits 1–15 and 19, including additional copies of the same editions of these publications.

IT IS FURTHER ORDERED AND ADJUDGED that the defendants, their agents, attorneys, employees, officers and servants, persons in active concert or participation with them, be and are hereby directed to surrender to the Sheriff of this County Exhibits 1–15 and 19 and including additional copies of the same editions of these publications and that said Sheriff is hereby directed and ordered to seize and destroy the same.

Exhibits 1–15 and 19 are described as follows:

EXHIBITS	NAME OF MAGAZINE
1.	Pinned No. 1
2.	Jaybird Photographer No. 9
3.	Cover Girl 16
4.	Missie No. 1
5.	Cover Girl 12
6.	Cover Girl 15
7.	Cover Girl 13
8.	Exciting 19
9.	Exciting 14
10.	Exciting 13
11.	Exciting 14
12.	Cover Girl NR 19
13.	Cover Girl NR 15
14.	Cover Girl NR 20
15.	Gigi

19. Governess

Michelle No. 1

Honey No. 1

Duchess

Luv

Pretty Girl No. 1

Suzette

Countess

Bunny No. 1

Nudist Form No. 1

Femmes No. 1

Baroness

Nudist No. 1

Wonderful Girl No. 1

Exciting, Nos. 12, 13, 14, 15, 16, 17, 19 & 20

Revue

Secret Lesbian Underground No. 2

Teddy Boys No. 1

Stag No. 2

Cover Girls Nos. 12, 13, 14, 15, 19 & 20

/s/ John T. Letts
Circuit Judge

CLAIM OF APPEAL

NOW COME Defendants by their attorney, John W. Piggott, and claim an appeal from the Judgment and Injunction entered in the Circuit Court for the County of Kent, Hon. John T. Letts, Circuit Judge, entered on the 18th day of March, 1968.

Dated this 4th day of April, 1968.

/s/ John W. Piggott
Attorney for Defendants –
Appellants.

APPENDIX E

Opinion

BEFORE: Levin, P.J., Holbrook and Danhof, J.J.

HOLBROOK, J.

This cause was commenced March 7, 1968, by the city attorney of the city of Grand Rapids, Michigan, requesting a permanent injunction restraining Floyd Bloss and the Kent County Theater Corporation, a Michigan corporation, defendants and their officers, agents, and employees from the further sale, distribution and acquisition or possession for sale of certain claimed obscene booklets or magazines submitted as exhibits 1 through 4 with the complaint and exhibits 5 through 15 and exhibit 19 submitted with amended complaints. Further relief was requested for their seizure and destruction.

The cause was heard on March 15 and 16, 1968, at the request of counsel for defendants and stipulation by plaintiff's counsel. On March 18, 1968, the Honorable John T. Letts. presiding judge, filed his written opinion, and in accord with the opinion on the same day a judgment was filed holding all the booklets and magazines in question obscene and enjoining their further sale, distribution and acquisition or possession for sale by defendants. It was also ordered that the copies of said booklets in possession of defendants be delivered to the sheriff and destroyed. The execution of this order was stayed at the request of defendant's counsel. The defendants appeal and raise 2 questions for consideration by this Court, viz:

(1) Did the trial court err in determining exhibits 1 through 15 and exhibit 19 obscene?

(2) Did the trial court err in admitting exhibit 19 comprising several booklets taken from defendants' book store

by police officers upon authority of and in the presence of the city attorney when they were there for the purpose of serving legal process and a temporary restraining order on defendants and their agents.

This action is authorized under CLS 1961, § 600.2938 (Stat Ann 1962 Rev § 27A.2938) which provides in pertinent part as follows:

> "(1) The chief executive or legal office of any city, village or charter township or prosecuting attorney of the county may institute and maintain an action in the circuit court against any person, firm or corporation to enjoin and prevent the sale or further sale or the distribution or further distribution or the acquisition or possession of any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure or image or any written or printed matter of an indecent character, which is obscene, lewd, lascivious, filthy, indecent or disgusting, or which contains an article or instrument of indecent or immoral use or purports to be for indecent or immoral use or purpose. * * *
>
> "(4) A preliminary injunction or restraining order may be issued upon or at any time after the filing of the complaint. The person, firm or corporation sought to be enjoined is entitled to trial of the issues within 1 day after joinder of issue and a decision shall be rendered by the court within 2 days of the conclusion of the trial.
>
> "(5) If a final order or judgment of injunction is entered in favor of such officer of the city, village or charter township and against the person, firm or corporation sought to be enjoined, the final order or judgment shall contain a provision directing the person, firm, or corporation to surrender to the sheriff of the county in which the action was brought any of the matter described in (1) and the sheriff shall be directed to seize and destroy the same."

Defendants cannot contest the legality of this proceeding under the foregoing statute permitting an injunction to issue and the destruction of copies of the booklets found to be obscene by the court, because in the case of *Kingsley Books v. Brown* (1957, 354 U.S. 436 (77 S Ct 1325, 1 Led 2d 1469), a nearly identical New York State statute was upheld in its entirety as constitutional.

It appears in the facts that the plaintiff is the city attorney of the city of Grand Rapids. Floyd Bloss, defendant is the owner of the Capri Book Store and Library and is also the owner of the corporate defendant that operates the Capri Theater. In effect he was responsible for both the operation of the Capri Theater and the Capri Book Store and Library. The theater shows adult movies and on occasion it advertises and permits admission without charge. There was consistently shown on the screen at the theater a trailer advertising the Capri Book Store and Library located about a block away. The defendant also maintained in the theater an advertising display for free inspection the type of material and books for sale at the book store. Some of the booklets found by the trial court to have been obscene were in this display.

All of the exhibits found obscene by the court except exhibit 19 were purchased from the Capri Book Store by witnesses who testified at the trial for plaintiff. The purchase price of these booklets was tremendously in excess of the cost of similar sized conventional booklets or magazines. The booklets comprising exhibit 19 were duplicates of exhibits 1 through 15 or different booklets. These were taken from defendants' book store by the officers and city attorney when they went to the book store to serve defendants and their agents with legal process.

The entrance to the Capri Book Store and Library is in an alcove shared by a branch office of the Secretary of State. Certain of the booklets in the book store can be viewed from the outside.

The plaintiff and defendants have cited in their briefs a great number of cases in support of their respective positions. They are too numerous to be dealt with individually herein. There are certain cases that are basic to the law of obscenity and essential to be considered and followed in making a correct decision in the instant case.

In the cases of *Roth v. United States* and *Alberts v. State of California* (1957), 354 US 476 (77 S Ct 1304, 1 Led 2d 1498) involving the construction of a federal statute (582 Roth) providing that obscene, lewd, lascivious, filthy, or indecent material is not mailable and that whoever knowingly deposits such material for mailing or delivery is criminally punishable. The California statute (61 Alberts) makes criminally punishable every person who wilfully and lewdly writes or otherwise produces obscene or indecent material, or who writes or otherwise produces any notice or advertisement of any such material. Both defendants were prosecuted, convicted and appealed their convictions finally to the United States Supreme Court.

In speaking for the majority of the Court, Mr. Justice BRENNAN on pp 1505, 1506, 1507, 1508, 1509, 1510 and 1511 stated as follows:

> "The dispositive question is whether obscenity is utterance within the area of protected speech and press. Although this is the first time the question has been squarely presented to this Court, either under the First Amendment or under the Fourteenth Amendment, expressions found in numerous opinions

indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press. [Cases cited]

"The guaranties of freedom of expression in effect in 10 of the 14 States which by 1792 had ratified the Constitution, gave no absolute protection for every utterance. Thirteen of the 14 States provided for the prosecution of libel, and all of those States made either blasphemy or profanity, or both, statutory crimes. As early as 1712, Massachusetts made it criminal to publish 'any filthy, obscene, or profane song, pamphlet, libel or mock sermon' in imitation or mimicking of religious services. Acts and Laws of the Province of Mass. Bay, c. CV, § 8 (1712), Mass. Bay Colony Charters & Laws 399 (1814). Thus, profanity and obscenity were related offenses.

"In light of this history it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. This phrasing did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech. *Beauharnais v. Illinois* ( ), 343 US 250, 266 (72 S Ct 725, 96 Led 919). At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press.

"The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. This objective was made explicit as early as 1774 in a letter of the Continental Congress to the inhabitants of Quebec:

" 'The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its

ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.' 1 Journals of the Continental Congress 108 (1774).

"All ideas having even the slightest redeeming social importance – unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion – have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the FirstAmendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. This is the same judgment expressed by this Court in *Chaplinsky v. New Hampshire* ( ), 315 US 568, 571, 572 (62 S Ct 766, 86 Led 1031, 1035).

" ' . . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. *These include the lewd and obscene . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . .* ' (Emphasis added.)

"We hold that obscenity is not within the area of constitutionally protected speech or press.

"It is strenuously urged that these obscenity statutes offend the constitutional guaranties because they punish incitation to impure sexual *thoughts*, not shown to be related to any overt antisocial conduct which is or may be incited in the persons stimulated to such *thoughts*. In Roth, the trial judge instructed

the jury: 'The words " obscene, lewd and lascivious" as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful *thoughts.*' (Emphasis added) In Alberts, the trial judge applied the test laid down in *People v. Wepplo* ( ), 78 Cal App 2d Supp 959 (178 P2d 853), namely, whether the material has 'a substantial tendency to deprave or corrupt its readers by inciting lascivious *thoughts* or arousing lustful desires.' (Emphasis added.) It is insisted that the constitutional guaranties are violated because convictions may be had without proof either that obscene material will perceptibly create a clear and present danger of antisocial conduct. But, in light of our holding that obscenity is not protected speech, the complete answer to this argument is in the holding of this Court in *Beauharnais v. Illinois, supra* (343 US at 266):

"Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts to consider the issues behind the phrase "clear and present danger." Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class.'

"However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. * * *

"The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons. *Regina v. Hicklin* (1868) LR 3 QB 360.Some American courts adopted this standard but later decisions have rejected it and substituted this test: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. The Hicklin test, judging obscenity by the effect of isolated passages upon the most

susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity. * * *

"It is argued that the statutes do not provide reasonably ascertainable standards of guilt and therefore violate the constitutional requirements of due process. *Winters v. New York*( ), 333 US 507 (68 S Ct 665, 92 Led 840). The federal obscenity statute makes punishable the mailing of material that is 'obscene, lewd, lascivious, or filthy . . . or other publication of an indecent character.' The California statute makes punishable, inter alia, the keeping for sale or advertising material that is 'obscene or indecent.' The thrust of the argument is that these words are not sufficiently precise because they do not mean the same thing to all people, all the time, everywhere.

"Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process.' . . . The Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices . . .' *United States v. Petrillo* ( ), 332 US 1, 7, 8 (67 S Ct 1538, 91 L ed 1877, 1883). These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark '. . . . boundaries sufficiently distinct for judges and juries fairly to administer the law . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense." (Emphasis supplied by Supreme Court)

In the case of *Memoirs v. Massachusetts* (1966), 383 US 413 (86 S Ct 975, 16 Led 2d 1), obscenity was further defined on pp 5, 6 as follows:

> "We defined obscenity in Roth in the following terms: 'Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' 354 US at 489, 1 Led 2d at 1509. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

In the case of *Mishkin v. New York* (1966), 383 US 502 (86 S Ct 958, 16 Led 2d 56), reh den 384 US 934 (86 S Ct 1440, 16 Led 2d 535), at p 62, the court enlarged the "average person" aspect of the test as to whether questioned material appeals to prurient interest, stating:

> "Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the Roth test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. The refernence to the 'average' or 'normal' person in Roth, 354 US, at 489, 490, 1 Led 2d at 1510, does not foreclose this holding. In regard to the prurient-appeal requirement, the concept of the 'average' or 'normal' person was employed in Roth to serve the essentially negative purpose of expressing our rejection of that aspect of the Hicklin test, *Regina v. Hicklin* (1868) LR 3 QB 360, that made the impact on the most susceptible person determinative."

In the case of *Ginzburg v. United States* (1966), 383 US 463 (86 S Ct 942, 16 Led 2d 31) reh den 384 US 934 (86 S Ct 1440, 16 Led 2d 536), it was further decided that the background of the circumstances of production, sale and publicity of the materials were legitimate factors in determining if the material is obscene, *i.e.,*: (p. 35)

> "In the cases in which this Court has decided obscenity questions since Roth, it has regarded the materials as sufficient in themselves for the determination of the question. In the present case, however, the prosecution charged the offense in the context of the circumstances of production, sale, and publicity and assumed that, standing along, the publications themselves might not be obscene. We agree that the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity, and assume without deciding that the prosecution could not have succeeded otherwise. As in *Mishkin v. New York* (1966), 383 US 502 (86 S Ct 958, 16 Led 2d 56), and as did the courts below, 224 F Supp, at 134, 338 F2d, at 14-15, we view the publications against a background of commercial exploitation of erotica solely for the sake of their prurient appeal. The record in that regard amply supports the decision of the trial judge that the mailing of all three publications offended the statute."

In *Ginzburg, supra,* there was evidence to show that the questioned publications were the stock in trade of "sordid business of pandering – ' the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of . . . customers.'" The Court found such evidence "relevant in determining "whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality – whether it was the basis upon which it was traded in the market place or a spurious claim for

litigation purposes." The Court further held that "where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity."

There are many other obscenity cases asserted to be applicable herein by both plaintiff and defendants. Those cases are not helpful here because the facts are not analogous or because the material ruled upon is not specifically set forth with particularity. This is true with reference to the case of *Redrup v. New York* (1967), 386 US 767 (87 S Ct 1414, 18 Led 2d 515) cited and relied upon by the defendants. This per curiam opinion as we read it is confined to the facts and material therein ruled upon.

As long as our fundamental law recognizes that obscene material is not protected under the First and Fourteenth Amendments to the United States Constitution, we are charged with the duty of enforcing the State obscenity statutes in accordance with *Roth and Alberts, supra,* and subsequent clear modifications as herein recited.

We deem it important to reiterate parts of the trial judge's opinion, as follows:

> "It is revealed that the patrons of the Capri Theater are subjected to various forms of advertising, primarily 'trailers' or commercial advertising, on the screen of the theater, informing said patrons to visit the Capri Book Store & Library after the show. In addition to said 'trailers', magazines of the type and kind that are on sale at the Capri Book Store are displayed in the lobby of the Capri Theater for examination by the patrons of the theater. The magazines, including editions of 'Cover Girl,' are displayed under a sign with the legend:
>
> "' This product is available at the Capri Book Store & Library at 303 S. Div.' (Exhibit 16)

"There was unrebutted testimony that the Capri Book Store & Library does not possess, display or sell standard, recognized periodicals. All merchandise apparently treats of and deals with sex, both male and female, both sexes in their nude state prominently displayed on three walls on the covers of the magazines.

"Defendant Floyd Bloss admitted that he was generally familiar with the contents of the magazines which he had on display but could not read the print in one because it was in the Swedish language.

"The court finds, after listening to the testimony, that each magazine comprising an exhibit (Exhibits 1 - 15 and 19) in this case was prominently displayed on a magazine rack and the cover of each magazine portrays sex in some lurid, morbid or enticing manner so as to invite further examination of its contents. * * *

"Generally speaking, most of the magazines, especially the editions of 'Cover Girl' and 'Exciting,' are dominated by photographs of nude or near-nude women in various sexual poses. These photographs often depict: The model on a bed or a bed is part of the picture; the model is in an enticing or lewd position such as a position of sexual intercourse; the pubic area is bare and such clothing as the women wear tends to accentuate the focus on the pubic area; i.e. silk stockings and garter belt; the model's pose accentuates the pubic area, i.e. the vagina is open; the model removes her clothing in a series of pictures suggestively; properties such as beds, stools, veils, chairs and clothing are used in such a way as to heighten prurient interest. * * *

"Some of the magazines carry an editorial comment to the effect that they are art magazines, exclusively for use in furnishing serious artists and persons interested in art, who have some difficulty to find living models, with suitable photographs to be used as substitutes for drawing, painting and sculpturing. The court finds these claims are spurious and that the magazines involved are designed for and intended to be distributed to persons who may have a

natural or prurient interest in pictures of nude women in various sexual poses.

"The court finds that the exhibits in question are patently offensive because each affronts contemporary community standards relating to the description or representation of sexual matters regardless of whether a national, statewide or local community standard is applied in determining the 'contemporary community standards.'

* * * * * * * *

"This court adopts and follows the 'Roth test' at least preliminarily, in arriving at a decision as to whether the exhibits before this court are obscene, viz., whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest. *Roth v. United States, supra,* Under this definition, as elaborated in subsequent cases, three elements must coalesce: It must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value. *Memoirs v. Massachusetts* (1966), 383 US 413 (86 S Ct 975, 16 Led 2d 1).

"In *United States v. 25,000 Magazines, Entitled 'Revue,'* (1966), 254 F Supp 1014, the following language is pertinent to this case:

" '(2) A. Not all photographs of nude women are obscene, even though the focus is on the breasts or the pubic area. Such photographs are not rendered obscene merely because the models are kneeling or lying down, or handling scarves, veils or other properties, or posed in unusual or vulgar positions, if their positions and expressions are not lewd or enticing. The inclusion of a nude man or men in such photographs does not render them obscene unless some type of sexual activity is depicted or suggested.

" '(3) B. Among the factors which may render such photographs obscene and which should be considered by enforcement authorities are: (1) that the model is on a bed or a bed is part of the picture; or (2) that the woman is in an enticing or lewd position; or (3) that the pubic area is bare and such clothing as the woman wears tends to accentuate the focus on the pubic area; or (5) that the woman is removing her final garment suggestively; or (6) that properties are used in such a way as to heighten prurient interest; or (7) that a man in the picture has an erection or a partial erection or any type of sexual activity is suggested or depicted.'

" '(4) The dominant theme of the material taken as a whole must be considered, but one or more obscene photographs may heighten the prurient appeal of other photographs in such a magazine.'

"Under the standards so set forth this court finds each and every one of the exhibits (Exhibits 1 - 15 and 19) to be disgusting, morbid and obscene. Each of said exhibits meet each of the prescribed tests. This court finds no social redeeming value or purpose in the publication or distribution of any of the exhibits (1–15 and 19) and finds that the sole and only motivation to be the exploitation of sex in its most disgusting form.

"In addition to the determination of obscenity under the Roth test, this court finds that as to each of the said exhibits the defendant Floyd Bloss has been in the business of purveying both textual and graphic matter openly advertised to appeal to the erotic or prurient interest of his customers, that is, the sordid business of pandering as defined in *Ginzburg v. United States* (1966), 383 US 463 (86 S Ct 536, 16 Led 2d 31)."

The history of man reflects the fact that man's experiences in life and human conduct has been instrumental in the formulation of governments by free men and the writing of Constitutions to circumscribe the rights and privileges of its citizens. Although not written on the printed

pages of such instruments it is imperative to acknowledge that rights and privileges contained therein, if truly to be operative for all men requires corresponding duties and responsibilities on the part of all citizens. This is true in the case of our federal Constitution which was built upon the morals of the Declaration of Independence. Our founding fathers accepted a moral code that recognized the harm that is brought about in the minds and hearts of men by being exposed to obscene publications. It is a generally accepted truth that as a man thinketh in his mind and heart, so is he. All acts of man, that which are good and legal or bad and criminal are a direct result of the preceding thought in the mind, and the desire in the heart of the actor. Our founding fathers never proclaimed that the freedom of speech and press in the First Amendment of our Constitution was to shelter commercial exploitation of obscene publications for profit. Our forefathers have consistently adhered to this truth. A substantial majority of the present generation has freely chosen to adhere to this truth recognizing that the direction on the compass of morality set by our founding fathers has played a vital part in the proper moral development of the people. It is hoped that this will be true of all future generations.

The public cannot and should not be insulated from the facts of life; neither should they be promiscuously exposed, embraced, enticed, or urged by devious methods to read or view obscene publications which stir their thought to that which attacks their moral fiber; for if such is permitted, the result will be a response by those affected which is less than the minimum requirement for the preservation of a survivable healthy society. The morals of the citizens of a nation determines that nation's progress and the length of her very life. All thinking men realize that if we cherish our great nation, if we love her, and would have her prosper and be a great force for good in this world – it is imperative that her ideals and morals be maintained on a high plane. The people's

acceptance of this truth is demonstrated by the obscenity laws adopted by their duly elected representatives in the legislatures of all the states and the Congress of the United States down through the years. These laws should be applied to all citizens alike if the hopes and expectations of our founding fathers are to be realized in our present day, this the last one-third of the Twentieth Century.

After reviewing the evidence including exhibits 1 through 15, we can come to no other conclusion but to find that the trial court's determination is correct, *i.e.*, that the publications (exhibits 1 through 15)* are obscene as tested by federal standards under *Roth* and *Alberts, supra; Ginzburg, supra; Mishkin, supra; Memoirs v. Massachusetts, supra.* These obscene publications are not protected under the First and Fourteenth Amendments of the United States Constitution.

The second issue raised by defendants asserts that exhibit 19 comprising several magazines and booklets taken by the officers at defendants' book store when serving the process of the court and a temporary restraining order upon defendants and agents was inadmissible.

The process and temporary restraining order pertained to the specific enforcement of a statute permitting a permanent injunction to issue enjoining the sale of claimed obscene material after a hearing on the merits and a judicial determination that the material was obscene. The process and the temporary restraining order did not permit a seizure of

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* No. 1, Pinned No. 1; No. 2, Jaybird Photographer No. 9; No. 3, Cover Girl 16; No. 4, Missie No. 1; No. 5, Cover Girl 12; No. 6, Cover Girl 15; No. 7, Cover Girl 13; No. 8, Exciting 19; No. 9, Exciting 14; No. 10, Exciting 13; No. 11, Exciting 14; No. 12, Cover Girl NR 19; No. 13, Cover Girl NR 15; No. 14, Cover Girl NR 20; No. 15, Gigi.

the material named in the complaint and certainly could not justify the seizure of other material not named. The case of *People v. Cataneo* (1955), (126 NE 2d 692) is dealt with by both counsel concerning the admission of exhibit 19. That case involved a seizure of gambling equipment when exhibited in open view in a public place. Printed matter is treated differently than gambling equipment because gambling equipment is contraband, *per se*. Printed matter may or may not be obscene based upon consideration of the entire contents of each publication. *Roth* and *Alberts, supra*. That there was a search is evidenced by the fact that of the material inspected about one-half was selected to be obscene in the opinion of the officers and the city attorney.

The search and seizure was not carried out pursuant to a search warrant nor was it contemporaneous with a lawful arrest. The statute under which plaintiff was proceeding did not provide for such a search and seizure. Under the circumstances, exhibit 19 was illegally seized and therefore not admissible.

The judgment of the circuit court is affirmed in all particulars except that exhibit 19 is deleted therefrom. No costs, a public question being involved.

Opinion

BEFORE: Levin, P.J., Danhof and Holbrook, JJ.

DANHOF, J., concurring

At the risk of being termed a fool for treading where those of higher stature might fearto trod, and being mindful that those concerned with the jurisprudence of obscenity will

little note nor long remember what we state herein; it is nevertheless the duty of this Court to make a decision in this matter.

If there be those who have doubts concerning the fractionalized nature of the law, as regard to obscenity, we invite their attention to *Redrup v. New York* (1967), 386 US 767, (87 S Ct 1414, 18 L ed 2d 515). We can only hope, that ultimately, the Supreme Court of the United States will hand down to those of us on a lower level, more definitive guidelines than we now have. However, pending that clairvoyant guidance we must proceed on the basis of what we have.

This writer is of the opinion that the criteria set forth in *Roth v. United States* (1957), 354 US 476, (77 S Ct 942, 1 L ed 2d 1498) as supplemented by *Memoirs v.Mass.* (1966), 383 US 413 (86 S Ct 975, 16 L ed 2d 1) are still controlling in the area of obscenity. The other cases which have dealt with this subject matter are merely interpretative of these basic propositions. Applying these criteria to the materials at hand, [1] I concur with my brother Holbrook in regards to exhibits 1 thru 15. In so doing I am mindful that counsel for the appellants has admitted that the publications in question are utterly without redeeming social value. The trial court having applied the necessary criteria and being in a much more advantageous position to be aware of the contemporary community standards than we are, must be affirmed.

I do not find in this case the elements of "pandering" which were present in the *Ginzberg v. United States* (1966), 383 US 463 (86 S Ct 942, 16 L ed 2d 31), nor I deem it necessary that these must be present. Also, *Redrup v. New*

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[1] At least those who believe that nothing is obscene have the advantage of not being required to view the publications.

York, supra must stand on the facts of that case and it has not overruled *Roth* and *Memoirs, supra.*

I concur also in the decision of my brother Holbrook as regards to exhibit 19.

The judgment of the circuit court is affirmed except as it relates to exhibit 19.

No costs, a public question being involved.

Opinion

BEFORE: Levin, P.J., Danhof and Holbrook, JJ.

LEVIN, P.J., concurring in part and dissenting in part

I am in entire agreement with my colleagues that the seized magazines are vulgar, tawdry and unpleasant. The question before us, however, is not whether these odious magazines are obscene in the ordinary sense of the word – they clearly are – but whether they are obscene in the constitutional sense. The phrase "obscene in the constitutional sense" is a term of art[1] coined by the United States Supreme

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[1] For non-art.

Court[2] and, to the extent it has defined that term, its definition is controlling upon us. Neither my personal opinion nor, I respectfully add, the opinions of my colleagues is relevant where there is a controlling opinion from the United States Supreme Court.

The United States Supreme Court has undertaken the exposition and control of the development of this area of the law. It has made it very clear that only in extraordinary cases will publications be deemed obscene in the constitutional sense.

In an area of the law such as obscenity where decision turns on definitions and definitions are inevitably, hopelessly obscure, we have more to learn from a comparison of the materials involved in the case before us with those passed upon by controlling authority in other cases than from an attempt ourselves to explicate still another definitional statement.

Unlike *Memoirs*[3] and a number of other pre-*Redrup* opinions of the United States Supreme Court,[4] the opinion in Redrup, decided in 1967, bears the signatures of a majority (7

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[2] *Redrup v. New York* (1967), 386 US 767 (87 S Ct 1414, 18 L ed 2d 515), holding not obscene the paperback books Lust Pool and Shame Agent and the magazines High Heels, Spree, Gent, Swank, Bachelor, Modern Man, Cavalcade, Gentleman, Ace and Sir.

In *People v. Zerilli* (1969), 14 Mich. App. 513, our Court on the authority of *Redrup* set aside Zerilli's conviction for selling typical so-called "girlie" and "nudist" magazines. We declared that we were "satisfied that the seized publications are of the same type held not to be 'obscene in the constitutional sense' in *Redrup v. New York* (1967), 386 US 767 (87 S Ct 1414, 18 L ed 2d 515), and in the cases collected in footnote 3 of *Ginsberg v. State of New York* (1968), 390 US 629 (88 S Ct 1274, 20 L ed 2d 195)." See footnote 5, *infra*, for a listing of the cases cited in footnote 3 of *Ginsberg* and additional United States Supreme Court decisions decided on the authority of *Redrup*.

[3] *A Book v. Attorney General* (1966), 383 US 413 (86 S Ct 975, 16 L ed 2d 1).

[4] See, *e.g.*, *Manual Enterprises v. Day* (1962), 370 US 478 (82 S Ct 1432, 8 L ed 2d 639); *Jacobellis v. Ohio* (1964), 378 US 184 (84 S Ct 1676, 12 L ed 2d 793); *Grove Press v. Gerstein* (1964), 378 US 577 (84 S Ct 1909, 12 L ed 2d 1035); *Tralins v. Gerstein* (1964), 378 US 576 (84 S Ct 1903, 12 L ed 2d 1033).

of the 9 justices) of the United States Supreme Court. Subsequent decisions of the United States Supreme Court clearly demonstrate that *Redrup* cannot be dismissed, as my colleagues would, as an isolated decision to be confined to its facts. On the *authority of Redrup* the United States Supreme Court has reversed 19 decisions of lower Federal and State courts.[5]

The seized magazines in the present case are of 2 types

1) magazines showing frontal views of undressed men and, thus, portraying male genitals; and

2) magazines focusing on female genitals.

Sexual activity is not portrayed in any of the magazines.[6]

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[5] *Keney v. New York* (1967), 38 US 440 (87 S Ct 2091, 18 L ed 2d 1302); *Friedman v. New York* (1967), 388 US 441 (87 S Ct 2091, 18 L ed 2d 1303); *Ratner v. California* (1967), 388 US 442 (87 S Ct 2092, 18 L ed 2d 1304); *Cobert v. New York* (1967), 388 US 443 (87 S Ct 2092, 18 L ed 2d 1305); *Sheperd v. New York* (1967), 388 US 444 (87 S Ct 2093, 18 L ed 2d 1306); *Advansino v. New York* (1967), 388 US 446 (87 S Ct 2093, 18 L ed 2d 1308); *Aday v. United States* (1967), 388 US 447 (87 S Ct 2095, 18 L ed 2d 1309); *Books v. United States* (1967), 388 US 449 (87 S Ct 2098, 18 L ed 2d 1311); *A Quantity of Books v. Kansas* (1967), 388 US 452 (87 S Ct 2104, 18 L ed 2d 1314); *Mazes v. Ohio* (1967), 388 US 453 (87 S Ct 2105, 18 L ed 2d 1315); *Schackman v. California* (1967), 388 US 454 (87 S Ct 2107, 18 L ed 2d 1316); *Conner v. City of Hammond* (1967), 389 US 48 (88 S Ct 234, 19 L ed 2d 47); *Potomac New Co. v. United States* (1967), 389 US 47 (88 S Ct 233, 19 L ed 2d 46); *Central Magazine Sales, Ltd. v. United States* (1967), 389 US 50 (88 S Ct 235, 19 L ed 2d 49); *Chance v. California* (1967), 389 US 89 (88 S Ct 253, 19 L ed 2d 256); *I.M. Amusement Corp. v. Ohio* (1968), 389 US 573 (88 S Ct 690, 19 L ed 2d 776); *Robert-Arthur Management Corp. v. Tennessee, ex rel. Canale*, (1968), 389 US 578 (88 S Ct 691, 19 L ed 2d 777); *Felton v. City of Pensacola* (1968), 390 US 340 (88 S Ct 1098, 19 L ed 2d 1220); *Henry v. Louisiana* (1968), 392 US 655 (88 S Ct 2274, 20 L ed 2d 1343).

[6] *See People v. Noroff* (1967), 67 Cal 2d 791 (63 Cal Rptr 575, 433 P2d 479); *In re Panchot* (1968), Cal 2d (73 Cal Rptr 689, 488 P2d 385).

The United States Supreme Court has in a number of cases held that magazines containing photographs of male models completely nude, showing full views of their genitals, are not obscene. *Potomac News Company v. United States* (1967), 389 US 47 (88 S Ct 233, 19 L ed 2d 46), reversing on the authority of *Redrup, United States v. 56 Cartons Containing 19,500 Copies of a Magazine Entitled "Hellenic Sun"* (CA 4, 1967), 373 F2d 635; similarly *Central Magazine Sales, Ltd. v. United States* (1967), 389 US 50 (88 S Ct 235, 19 L ed 2d 49), reversing *United States v. 392 Copies of Magazine Entitled "Exclusive"* (CA 4, 1967), 373 F2d 633; *Manual Enterprises, Inc. v. Day* (1962), 370 US 478 (82 S Ct 1432, 8 L ed 2d 639); *Felton v. City of Pensacola* (1968), 390 US 340 (88 S Ct 1098, 19 L ed 2d 1220) reversing (Fla App, 1967), 200 So2d 842; *Sunshine Book Co. v. Summerfield* (1958), 355 US 372 (78 S Ct 365, 2 L ed 2d 352) reversing (CADC, 1957), 247 F2d 114 and (DCDC, 1955), 128 F Supp 564.

The pictures in the magazines focusing on female genitals are most explicit. The models are shown standing, sitting, kneeling and lying on their backs or stomachs and in many cases with their legs spread revealing the entire genital area.

In *Central Magazine Sales, Ltd. v. United States, supra,* 7 justices, 6 on the authority of *Redrup,* by a per curiam opinion reversed the decision of the United States Court of Appeals for the Fourth Circuit in *United States v. 392 Copies of Magazine Entitled "Exclusive", supra.* The Court of Appeals described the magazine Exclusive thusly (p. 634):

> "Exclusive is a collection of photographs of young women. In most of them, long stockings and garter belts are employed to frame the pubic area and to focus attention upon it. A suggestion of masochism is sought by the use in many of the

> pictures of chains binding the model's wrists and ankles. Some of the seated models, squarely facing the camera, have their knees and legs widespread in order to reveal the genital area in its entirety. In one of the pictures, all of these things are combined: The model, clad only in a framing black garter belt and black stockings is chained to a chair upon which she is seated, facing the camera, with one knee elevated and both spread wide."

Central Magazine Sales, Ltd. v. United States, supra, establishes that full views of female genitals,[7] no less than full views of male genitals, are not obscene in the constitutional sense.

I agree with Judge Danhof that the trial judge clearly erred when he found that there was pandering in this case. The defendant sold these magazines in a bookstore to which no one under the age of 18 is admitted. There is a $1.00 admission charge, 50 cents of which is credited against any purchase. The defendant also operates an art, adult-only movie theatre. He advertises, on the screen and by displaying the magazines in the theatre lobby, the fact that such publications can be purchased at the bookstore.

By displaying the magazines themselves without any description of their contents the defendant avoided any characterization, suggestive or otherwise, concerning the nature of the magazines on display. By displaying the magazines in an "adult-only" movie theatre the defendant avoided any communication with persons who might regard

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[7] A panel of 5 United States district judges sitting *en banc* in the district of Maryland held that issues of the Danish magazines "Cover Girl" and "Exciting" were not subject to seizure because not obscene in the constitutional sense. *United States v. 4400 Copies of Magazines* (1967), 276 F Supp 902. A number of the exhibits in this case are copies of the same issues of the 2 publications ruled upon in the cited case; they are typical of the female genitalia exhibits.

the sight of such a magazine as an objectionable intrusion. The on-screen advertising of the availability of these magazines and their display in the lobby of such a movie theatre is neither "pandering" nor "obtrusive" in the sense in which those terms were used in *Redrup* and *Ginzburg v. United States* (1966), 383 US 463 (86 S Ct 942, 16 L ed 2d 31).

I agree with my colleagues that the publications comprising exhibit 19 were illegally seized.

I would reverse and vacate the injunction.

APPENDIX F

APPLICATION

NOW COMES Defendant-Appellant, Floyd Bloss, by and through his attorney, John W. Piggott, and moves this honorable court for leave to appeal from a decision of the Court of Appeals, Third Division, dated May 9,1969, Judges Holbrook, Danhof, and Levin, Appeals Court Docket No. 5365, affirming the judgment of the Hon. John T. Letts, Circuit Judge, Kent County, Michigan, saying as follows:

That Appellant has a meritorious basis for his appeal in that:

A) The subject matter of the litigation involved herein involves rights guaranteed under the First and Fourteenth Amendments of the United States Constitution, and Article One, Section Five, of the Michigan Constitution of 1963, and more particularly rights of free speech and expression.

B) That the decision of the Court of Appeals, Third Division, is clearly erroneous and that as a result thereof material injury will be suffered by this Appellant.

C) That the decision of the Court of Appeals is contrary to the interpretative decisions of the United States Supreme Court, more particularly, Redrup v. New York, 386 US 767, 87 S. Ct. 1414, 18 L ed 2d 215 (1967); Central Magazine Sales Limited v. United States, 88 S. Ct. 235, 389 US 50 (1967); and Potomac News Company v. United States, 88 S. Ct. 233 (1967) reversing 373 Fed 2d 635 (1968).

D) That the decision of the Court of Appeals is contrary to two other unanimous decisions of the

Court of Appeals, State of Michigan, First Division, to-wit: the case of People v. Zerelli, 14 Mich. App. 513 (1969) and Olson v. Doerfler and Royal News, 14 Mich. App. 428 (1969)

all as more fully appear in the Statement of Facts and other documents attached hereto and made a part hereof including; though not limited to the decision of the Court of Appeals.

WHEREFORE, Petitioner prays that this Court will grant him leave to appeal pursuant to Rule 853 General Court Rules 1963 or in the alternative enter a final decision reversing the Appellate Court pursuant to Rule 853.2 (4).

Respectfully submitted this 28th day of May, 1969.

JOHN W. PIGGOTT
Attorney for
Defendants-Appellants

ORDER

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 23rd day of December in the year of our Lord one thousand nine hundred and sixty-nine.

On order of the Court, the application for leave to appeal is considered, and the same is hereby DENIED, as defendants and appellants have failed to persuade the Court that they have a meritorious basis for appeal or that the decision of the Court of Appeals was clearly erroneous.

APPENDIX G

MICHIGAN STATUTES ANNOTATED, 27A.2938

SPECIFIC ACTIONS

600.2938

Obscene matter; injunction; adjudication of lawfulness, procedure; issuance of injunction; sale after summons and complaint; delegation of legislative authority; effect of adjudication; nature of proceedings

Sec. 2938. (1) **Injunction.** The chief executive or legal office of any city, village or charter township or prosecuting attorney of the county may institute and maintain an action in the circuit court against any person, firm or corporation to enjoin and prevent the sale or further sale or the distribution or further distribution or the acquisition or possession of any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure or image or any written or printed matter of an indecent character, which is obscene, lewd, lascivious, filthy, indecent or disgusting, or which contains an article or instrument of indecent or immoral use of purports to be for indecent or immoral use or purpose.

(2) **Adjudication of lawfulness, procedure.** Any person, firm or corporation may also bring an action in the circuit court as plaintiff to obtain an adjudication of the lawful propriety of the sale, distribution, possession or acquisition of any item as follows:

(a) The item may be submitted to the chief executive or legal officer of the city, village, charter township or prosecuting attorney of the county in which the sale, distribution, possession or acquisition is intended to be had.

(b) The officer to whom submitted, within 5 days shall furnish to the person, firm or corporation by whom submitted, a written statement in positive and unequivocal words that the sale, distribution, possession or acquisition of such book or other article or thing so submitted is by him deemed or not deemed, as the case may be, to be in violation of the provisions of any section of the Michigan penal code.

(c) If the officer deems the sale, distribution, possession or acquisition to be in violation of the provisions of any section of the Michigan penal code, the person, firm, or corporation making the submission may bring a civil action to adjudicate the lawful propriety of the sale, distribution, possession or acquisition.

(d) The officer to whom a submission is authorized to be made, without any submission being so made, may furnish to any person, firm or corporation a written statement covering any book or other article or thing referred to in (1), and thereupon the person, firm or corporation to whome so furnished has a like right to bring action as in the case of the statement furnished pursuant to a submission.

(3) **Temporary injunction, application.** In any action brought as provided in (2) the officer furnishing the written statement shall be made defendant thereto. The officer shall be given prior notice of the time and place of filing such action and has the right to appear at such time and place and seek an injunction against distribution pending the final adjudication thereon.

(4) **Preliminary injunction, summary determination.** A preliminary injunction or restraining order may be issued upon or at any time after the filing of the complaint. The person, firm or corporation sought to be enjoined is entitled to a trial of the issues within 1 day after joinder of issue and

a decision shall be rendered by the court within 2 days of the conclusion of the trial.

(5) **Injunction, surrender of obscene matter, destruction.** If a final order or judgment of injunction is entered in favor of such officer of the city, village or charter township and against the person, firm or corporation sought to be enjoined, the final order or judgment shall contain a provision directing the person, firm or corporation to surrender to the sheriff of the county in which the action was brought any of the matter described in (1) and the sheriff shall be directed to seize and destroy the same.

(6) **Injunction without bond; nonliability for costs or damages.** In any action brought as herein provided the officer of the city, charter township or village shall not be required to file any undertaking before the issuance of an injunction order provided for in (4), is not liable for costs and is not liable for damages sustained by reason of the injunction order in cases where judgment is rendered in favor of the person, firm or corporation sought to be enjoined.

(7) **Distribution of obscene matter after summons and complaint, knowledge of contents.** Every person, firm or corporation who sells, distributes or acquires possession with intent to sell or distribute any of the matter described in (1), after the service upon him of a summons and complaint in an action brought by such officer of any city, charter township or village pursuant to this section is chargeable with knowledge of the contents thereof.

(8) **Delegation of authority to other officers or agency.** The legislative body of any city, village or charter township or board of supervisors of any county may transfer or delegate any of the power and authority of the chief executive or legal

officer or prosecuting attorney, as the case may be, to any other officer or agency of the city, village, charter township or county and all acts done by the officer or agency to whom so transferred or delegated shall be as effective in law as if done by the officer in this section designated.

(9) **Adjudication hereunder: criminal prosecution.** Nothing in this section shall be construed to preclude or impair prosecution in the criminal courts for violation of any section of the Michigan penal code relating to obscene or other similar matters except when an adjudication has been made under the procedure authorized herein to the effect that the book, picture, or other subject of adjudication is not violative of any such law such adjudication is full protection for all persons against any prosecution for criminal penalties or other action in respect of the subject of such adjudication.

(10) **Proceedings equitable in nature.** Proceedings under this section are equitable in nature. P.A. 1961, No. 236, § 2938, Eff. Jan. 1, 1963.

CONSTITUTION OF THE UNITED STATES

AMENDMENTS TO THE CONSTITUTION

[Amendment I]

[Freedom of Religion, of Speech, and of the Press]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assembly, and petition the Government for a redress of grievances.

[Amendment V]

[Rights of Accused in Criminal Proceedings]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person by subject for the same offense to be twice put in jeopardy of life of limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[Amendment XIV]

Section 1.

[Citizenship Rights Not to Be Abridged by States]

* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1969

No. 1347

FLOYD BLOSS; KENT COUNTY THEATER CORPORATION, a Michigan corporation; their officers, agents and employees,
Petitioners,

v.

STEVEN L. DYKEMA, as City Attorney of the City of Grand Rapids, Michigan,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1969

No. 1347

FLOYD BLOSS; KENT COUNTY THEATER CORPORATION, a Michigan corporation; their officers, agents and employees,
Petitioners,

v.

STEVEN L. DYKEMA, as City Attorney of the City of Grand Rapids, Michigan,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

OPINIONS BELOW

The Opinion of the Court of Appeals of the State of Michigan in this matter is reported at 17 Mich. App. 318 (1969).

The Order of the Supreme Court of Michigan in this matter denying leave to appeal the decision of the Michigan Court of Appeals is reported at 383 Mich. 754 (1969).

QUESTIONS PRESENTED

I. **Are the procedures provided by § 2938 of the Michigan Revised Judicature Act a constitutionally permissible means of proscribing obscene written and graphic material?**

II. Are Exhibits 1 through 15 constitutionally obscene expression and thus proscribable under otherwise valid statutory practices?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The references made by the Petitioners to [illegible] of the *Michigan Statutes Annotated*, are references to [illegible] of the Michigan Revised Judicature Act, which is set forth in the official edition at [illegible] of the Compiled Laws of Michigan of 1948.

STATEMENT OF THE CASE

In accordance with the terms of [illegible] of the Michigan Revised Judicature Act, [illegible] Mich. Comp. L. (1948), the City Attorney of the City of Grand Rapids, Michigan, Respondent herein, commenced on March 7, 1963, a civil action in the Circuit Court for Kent County, Michigan, requesting that the court entertain within one day after the matter was at issue a hearing on the question whether four specifically named magazines sold by the Petitioners were obscene and further requesting, that thereafter the Petitioners be permanently enjoined from the dissemination, possession and distribution of such magazines. Also requested was the entry of a preliminary restraining order, pending the hearing on the request for a permanent injunction as to the four publications.

Attached to the complaint of the Respondent was the affidavit of a police officer, who had purchased books with that the Petitioners had sold the four magazines named. Also attached to the complaint were the four magazines themselves. After examination of the Respondent's complaint, the attached affidavit and the attached four magazines, the court at 3:10 p.m. on March 7, granted the Respondent's request for a preliminary restraining order pending the hearing on the request for a permanent injunction, and

directed that a hearing with respect to the permanent injunction be held at 4 o'clock p.m. on March 8, less than 24 hours hence. The Petitioners were served with a copy of the complaint and temporary restraining order, containing notice of the hearing on the matter of permanent injunction, at about 6:15 p.m. on March 7.

On March 13 and 15 the Respondent amended his complaint to include certain specifically named additional publications acquired at the Petitioners' bookstore subsequent to the filing of the complaint. No temporary restraining order was issued as to such additional publications, however.

The Petitioners stipulated that the hearing need not be held within the one-day period required by the statute and as specified in the court's order. Pursuant to the stipulation, a hearing was held in the matter on March 15 and 16, 1965. The Petitioners received notice of the hearing and were represented there by counsel. The court's decision in the matter was issued within two days after the conclusion of the hearing on March 18, the court finding by opinion that the publications were obscene as the term has been defined by decisions of this Court. That portion of the judgment directing the sheriff to seize and destroy the exhibits found obscene was stayed by the court, upon request of the Petitioners, pending their appeal of the court's decision.

The Petitioners appealed the matter to the Court of Appeals of the State of Michigan, raising two questions whether the materials were obscene and whether the court erred in admitting the materials obtained without search warrant subsequent to filing of the complaint. The Petitioners did not raise the question of the unconstitutionality of the statute involved. See MSA Comp. L. (1948) §§ decisions entered on May 6, 1965, the Court of Appeals affirmed the finding of a trial court as to the obscenity of the materials involved, but the court reversed the finding of the trial court that the exhibits removed from the Petitioners' bookstore without search warrant were properly admitted into evidence. The court, rather, found such materials to have been inadmissible in the trial court proceed-

ing, and the question of the propriety of the acquisition of such materials was thereafter not an issue in the case.

The Petitioners requested from the Supreme Court of the State of Michigan leave to appeal the decision of the Court of Appeals, stating that the litigation involved rights of free speech and expression and that the decision of the Court of Appeals was clearly erroneous. The Petitioners did not contend that the statute in question was unconstitutional. On December 23, 1969, the Supreme Court of Michigan denied the Petitioners' application, finding that they had not sufficiently demonstrated that there was a meritorious basis for appeal or that the decision of the Court of Appeals was clearly erroneous.

ARGUMENT

The petition for writ of certiorari to the Supreme Court of Michigan should not be granted. The order of the Michigan Supreme Court denying leave to appeal the decision of the Court of Appeals correctly held that the Petitioners' application had not demonstrated that the decision of the Court of Appeals was clearly erroneous. The opinion of the Court of Appeals correctly found that the materials involved were obscene as a matter of law, the court relying for such finding upon the applicable decisions of this Court. This Court has reached no decisions in the interim which would cast doubt on the correctness of such finding. The statute, Section 2928 of the Revised Judicature Act, is a constitutional, sufficiently limited method of dealing with obscene matter; it was evenly and fairly applied in this case; the materials proscribed according to its terms were obscene as that term has been defined by various decisions of this Court. Since such materials are obscene in the constitutional sense, and thus are proscribable by otherwise valid statutory methods, and since the method employed here is a constitutionally acceptable approach, there is no significant public or private interest which could be served by the review of the state courts' decisions in this instance.

I. Are the procedures provided by § 2938 of the Michigan Revised Judicature Act a constitutionally permissible means of proscribing obscene written and graphic material?

The procedures set forth in § 600.2938 Mich. Comp. L. (1948) establish a civil method by which the State of Michigan has chosen to deal with obscene matter, in addition to the sanctions of its criminal law. In selecting such a method, the State has recognized the harshness inherent in criminal penalties in this area, and the difficulty in limiting dissemination of obscene material by the use of piecemeal prosecutions of each individual sale or transaction. Section 2938 is an attempt to prevent the imposition of prior restraints upon the exercise of First Amendment rights, for it authorizes no action whatever before publication, and permits no seizure of allegedly obscene material until after an adversary hearing and judicial determination of obscenity.

Indeed, the procedures prescribed by § 2938 are perhaps the only method by which the State may effectively deal with the dissemination of obscene matter, yet still assure the constitutional sanctuary properly reserved to non-obscene material. The statute permits no determination of obscenity by non-judicial means. It permits no permanent injunction against the distribution of allegedly obscene matter until after an adversary hearing has been held, of which the defendant has notice and at which the defendant may be present and defend. The statute permits no permanent injunction without notice, nor does it permit a permanent injunction until after a judicially supervised hearing on the question of obscenity. The statute establishes no board of censors; it authorizes no administrative or other non-judicial hearings or determinations; it provides no licensing procedures; it contains no provisions for the issuance of search warrants.

The statute accords scrupulous protection to non-obscene material, as it should. Before material is actually judicially determined to be obscene, it may not be seized; distribution may not be temporarily or permanently enjoined, and dis-

tributors may not, without resort to other statutes, if any, be subjected to the sanctions of the criminal law. In addition, § 2938 further provides that, once an adjudication of non-obscenity has been made pursuant to the section, such adjudication precludes as a matter of law prosecution for violation of criminal statutes or any other legal proceedings with respect to the materials found not obscene. The section thus grants to questionable material, once found not obscene, a degree of immunity from legal processes that it would not otherwise enjoy.

To further avoid the restriction of non-obscene or allegedly obscene materials, the section requires that the defending party is entitled to a trial of the issues within one day after the case is at issue and further requires that the court must render a decision within two days after the conclusion of the trial. The temporary injunction authorized at or after the filing of the complaint thus will in the usual case be in effect for at most a one-day period before the beginning of the trial.

The language of § 600.2938 is taken almost entirely from the New York statute found constitutional by this Court in *Kingsley Books v. Brown*, 354 U.S. 436 (1957). The New York statute prescribed similar methods for dealing with obscene material, and with respect to such methods the Court said on that occasion:

> "Resort to this injunctive remedy, it is claimed, is beyond the constitutional power of New York in that it amounts to a prior censorship of literary product and as such is violative of that 'freedom of thought, and speech' which has been 'withdrawn by the Fourteenth Amendment from encroachment by the states.'" . . .
>
> In an unbroken series of cases extending over a long stretch of this Court's history, it has been accepted as a postulate that the 'primary requirements of decency may be enforced against obscene publications.' . . . And so our starting point is that New York can constitutionally convict appellants of keeping for sale the booklets incontestably found to be obscene. . . . The immediate problem then is whether New York can

adopt as an auxiliary means of dealing with such obscene merchandising the procedure of § 22-a.

We need not linger over the suggestion that something can be drawn out of the Due Process Clause of the Fourteenth Amendment that restricts New York to the criminal process in seeking to protect its people against the dissemination of pornography. It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. Whether proscribed conduct is to be visited by a criminal prosecution or by a qui tam action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range of choice. . . . If New York chooses to subject persons who disseminate obscene 'literature' to criminal prosecution and also to deal with such books as deodands of old, or both, with due regard, of course, to appropriate opportunities for the trial of the underlying issue, it is not for us to gainsay its selection of remedies." At pp. 440-441.

Discussing further the New York statutory scheme, the Court pointed out the advantages of dealing with obscene materials in the manner prescribed by the statute, as opposed to other possible methods:

"Instead of requiring the bookseller to dread that the offer for sale of a book may without prior warning subject him to a criminal prosecution with the hazard of imprisonment, the civil procedure assures him that such consequences cannot follow unless he ignores a court order specifically directed to him for a prompt and carefully circumscribed determination of the issue of obscenity. Until then, he may keep the book for sale and sell on his own judgment rather than 'steer nervously among the treacherous shoals.'" . . .

Criminal enforcement and the proceeding under 22-a interfere with a book's solicitation of the public at precisely the same stage. In each situation the law

> **moves after publication; the book need not in either case have yet passed into the hands of the public." At 442.**

The Court has entered no opinion since *Kingsley Books* questioning or reconsidering the opinion in that case, and in *Freedman v. Maryland*, 380 U.S. 51 (1965), it approved again the New York methods of dealing with obscene material, as outlined in *Kingsley Books, supra.*

The application of § 2938 to the dissemination of the materials involved in this case was a constitutionally circumscribed, narrowly focused expression of the state's legitimate interest in inhibiting the circulation of legally obscene matter. There was no seizure at all authorized by the court's initial order, and § 2938 permits no such preliminary seizure. The temporary restraining order was effective only after judicial scruting of the magazines. There was thus an independent, non-administrative check on the prosecuting authority at a point before any restraint occurred. There was no restraint by the authority of the city attorney alone, or by the sole authority of any other non-judicial officer.

The temporary restraint itself was against only four specifically named and previously judicially examined magazines; there was no mass suppression; there was no mass seizure; there was no censorship of publication; there was no closing of the petitioners' business; there were none of the indiscriminate seizures condemned by the Court in *Marcus v. Search Warrant*, 367 U.S. 717 (1961), and *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964). There was no discretion here left to the city attorney, or to any other non-judicial official. The court examined the publications; the court issued the temporary restraining order; the court directed a prompt hearing on the question of obscenity and the permanent injunction.

The order of the court directed a hearing be held within one day after the matter was at issue. The Petitioners were served notice immediately after issue of the temporary restraining order and accordingly, by the terms of the court's order itself any restraint extended for actually

less than one day (the Petitioners did, however, waive their right to have the hearing on the following day). In *Marcus v. Search Warrant, supra,* the Court noted that *Kingsley Books, supra,* did not support the "extensive restraints" involved in *Marcus* prior to an adversary proceeding on the issue of obscenity. In *Marcus* 11,000 copies of 280 publications were seized. Of these, one-third were eventually held not obscene, but not before they had been suppressed for more than two months. In *Quantity of Books, supra,* the sheriff seized and impounded 1,715 copies of 31 books. Under the terms of the court's order in that case, an adversary hearing was not held for ten days, during which time the impoundment remained in effect.

Unlike *Marcus* and *Quantity of Books,* the procedures used in the Petitioners' case, and prescribed by § 2938, focused searchingly on the question of obscenity before any action at all occurred with respect to the publications. By judicial supervision at all stages, there were no practices inhibitive of the circulation of non-obscene materials and the public was not for any significant period denied access to materials prior to an adversary hearing with respect to their obscenity. Accordingly, the procedures established by § 2938 and their use in this case were an appropriate method for dealing with obscene material, and a proper assurance of constitutional sanctuary to other types of expression.

II. Are Exhibits 1 through 15 constitutionally obscene expression and thus proscribable under otherwise valid statutory practices?

The Michigan Court of Appeals affirmed the trial Court's finding that the materials admitted in evidence as Exhibits 1 through 15 were constitutionally obscene expression and were thus appropriate subjects of restraint under the procedures of § 2938. *Grand Rapids City Attorney v. Bloss,* 17 Mich. App. 318 (1969).

The Court of Appeals' decision was reached by appropriate application of the decisions of this Court which have

prescribed the extent to which obscene written and graphic material is protected by the guarantees of the First Amendment. In *Roth v. U.S.*, 354 U.S. 476 (1957), the Court held that obscene material is not protected by the free speech and press provisions of the First and Fourteenth amendments:

> "In light of this history it is apparent that the unconditional phrasing of the first amendment was not intended to protect every utterance. . . .
>
> "But implicit in the history of the first amendment is the rejection of obscenity as utterly without redeeming social importance. . . .
>
> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. *These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of idea, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.* . . .
>
> "We hold that obscenity is not within the area of constitutionally protected speech or press." [Emphasis in original] At 483-485.

The Court further refined the *Roth* definition in *Manuel Enterprises v. Day*, 370 U.S. 478 (1962), emphasizing that any determination of constitutional obscenity must initially conclude that the material in question is so offensive on its face "as to affront current community standards of decency." 370 U.S. 482. In *Jacobellis v. Ohio*, 376 U.S. 184 (1964), the Court specifically re-affirmed *Roth*, and the test for obscenity enunciated there. The Court pointed out in addition that the constitutional status of questioned material may not depend upon a weighing of its social importance against its prurient appeal. In *Memoirs v. Mass.*, 383 U.S. 413 (1965), the Court emphasized that

the three tests for determination of obscenity prescribed by *Roth* must be applied independently, 383 U.S. 419:

> "A book cannot be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria has to be applied independently; the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness." [Emphasis in original]

In *Mishkin v. New York*, 383 U.S. 502 (1965), the Court expressly acknowledged that the *Roth* definition of obscenity does not mean only what has been described as "hard-core pornography," 383 U.S. 508:

> "The New York courts have interpreted obscenity in § 1141 to cover only so-called 'hard-core pornography' . . . . *Since that definition of obscenity is more stringent than the Roth definition,* the judgment that the constitutional criteria are satisfied is implicit in the application of § 1141 below." [Emphasis supplied]

Ginzburg v. U.S., 383 U.S. 463 (1965), held that the circumstances surrounding the purveyance of allegedly obscene material may be important, even decisive, in determining whether such material is obscene in the constitutional sense. In that case, there was evidence to show that the questioned publications were the stock in trade of "the sordid business of pandering — 'the business of purveying textual and graphic matter openly advertised to appeal to the erotic interests of . . . customers.' " 383 U.S. 467. The Court found such evidence "relevant in determining the ultimate question of obscenity" and in "determining whether social importance claimed for material was . . . pretense or reality." 383 U.S. 470. The Court further held that "where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of

obscenity," 383 U.S. 470, and that "in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the *Roth* test." 383 U.S. 474.

In a per curiam decision in *Redrup v. New York*, 386 U.S. 767 (1967), the Court acknowledged the widely divergent views of its members concerning the constitutional status of allegedly obscene material, but prescribed no new standards by which such material might be judged, 386 U.S. 770. The Court did observe in the *Redrup* opinion that the materials there in question were not published obtrusively, that they were not pandered, and that the statutes involved were not those protecting solely juveniles. 386 U.S. 769. The Court's holding, however, was reached entirely in reliance on the previously announced tests for obscenity, the Court pointing out that, "whichever of these constitutional views is brought to bear upon the cases before us, it is clear that the judgments cannot stand." 386 U.S. 771.

Exhibits 1 through 15 in this case are obscene in the constitutional sense. Their dominant theme, taken as a whole, appeals to a prurient interest in sex, based on national contemporary community standards. The exhibits are patently offensive; they are utterly without redeeming social value. Moreover, the obscenity of the exhibits is readily supported by evidence of the factors of exploitation held significant by the Court in *Ginzburg, Memoirs* and *Mishkin, supra*. The setting in which the Petitioners disseminated the magazines in question is itself probative of their obscene nature. The record discloses, for example, that the Petitioners displayed in the lobby of their motion picture theater actual copies of the obscene publications which were sold at their bookstore. Accompanying this display was a sign advising patrons of the theater that such materials were available at the bookstore (R 64-65; 79-80; 96-100). Petitioner Bloss admitted that such copies on display in the theater were periodically changed so that the same magazines would not be displayed for long periods of time (R 79, 100). Moreover, the Petitioners routinely projected on the motion picture screen at their theater a

message urging patrons to visit their bookstore, listing its address and indicating "adults only" (R 64, 100).

The Petitioners' "sole emphasis is on the sexually provocative aspects of [their] publications." *Ginzburg*, 383 U.S. 470. They do not merely verbally describe the contents of the publications, or merely tell the public what they can expect to find therein. Rather, they physically remove copies of the publications themselves and place them on open and readily accessible exhibition in the lobby of their motion picture theater. Such an approach is far more blatant pandering than that tried in *Ginzburg*, for the publications themselves are far more obscene than any verbal description of them could ever be.

The Petitioners thus not merely promise what their magazines will contain — they openly flaunt the magazines themselves, obtrusively, unavoidably, on persons who are seeking to watch a motion picture. Once such persons reach the motion picture viewing area, they are again urged to visit the Petitioners' bookstore, by the message on the motion picture screen, described above. This, together with the obtrusive display of the obscene publications themselves, is a calculated appeal to prurient interest; it is an indiscriminate exhibition of sexually provocative materials before unsuspecting persons; it is an exploitation of obscene materials, in the hope that such exploitation will entrap those among the motion picture patrons to whom such materials appeal, yet intruding just as surely before all other persons.

The obscene magazines designated as Exhibits 1 through 15 are the Petitioners' stock in trade. The Petitioners are engaged in "the sordid business of pandering," for they purvey textual and graphic matter which they openly advertise to appeal to the erotic interests of their customers. *Ginzburg*, 383 U.S. 467. No other advertising method could be more effective than the Petitioners' scheme of removing some of the obscene materials from the place where they are normally purveyed, and flagrantly displaying them in another place attended by the public, together with a sign stating where such materials are available.

There is no interest to which Exhibits 1 through 15 appeal other than the prurient. In openly displaying their magazines in the lobby of the theater, the Petitioners make a "deliberate representation" of them as "erotically arousing," *Ginzburg*, 383 U.S. 470. The Petitioners' emphasis is on only the sexually provocative aspects of their publications, the Petitioners emphasizing such aspects of the publications "in order to catch the salaciously disposed." *Ginzburg*, 383 U.S. 472. The fact that the publications were exploited by the Petitioners "entirely on the basis of [their] appeal to prurient interest," as in *Ginzburg*, "strengthens the conclusion" that they are not "constitutionally protected matter." *Ginzburg*, 383 U.S. 474-475.

The Petitioners have argued that their theater is an "adults only" theater, apparently contending either that their display of obscene publications will not be seen by juveniles, or that persons who attend the theater are also those who are interested in such publications. Mere insulation of obscene material from juveniles does not, of course, make that material constitutionally acceptable. There is no evidence in the record whatever to show that those who attend the Petitioners' theater are also those who are favorably disposed to such publications as Exhibits 1 through 15, nor even is there evidence to show what sort of motion pictures are shown at the theater.

In addition to its reference in *Redrup* to the control of obscene material by statutes directed solely at juveniles, the Court has further recognized the danger that public distribution of obscene materials may result in such materials reaching the hands of children. In *Stanley v. Georgia*, 394 U.S. 557 (1969), the Court said, at page 567:

> "It is true that in *Roth* this Court rejected the necessity of proving that exposure to obscene material would create a clear and present danger of antisocial conduct or would probably induce its recipients to such conduct. . . . But that case dealt with public distribution of obscene materials and such distribution is subject to different objections. For ex-

> ample, there is always the danger that obscene material might fall into the hands of children, see *Ginsberg v. New York*, *supra*, or that it might intrude upon the sensibilities or privacy of the general public."

In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court upheld a New York criminal obscenity statute which prohibited the sale to minors under 17 years of age of material defined to be obscene on the basis of its appeal to them whether or not it would be obscene for adults. At 390 U.S. 639, the Court stated:

> "The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations in § 484-h upon the availability of such material to minors under 17, at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful. First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. At 639. . . .
>
> The State also has an independent interest in the well-being of its youth." At 640.

The record in this case demonstrates that the dissemination of the Petitioners' obscene publications was obviously not insulated from juveniles. The officer in charge of the uniform division of the Grand Rapids Police Department, in response to questioning as to the places where obscene material finally comes to rest, testified that the local police department had repeatedly found such materials in the hands of 10 to 15-year old children, playing in the public parks and other areas. (R 213-216). It is undeniable that, though the Petitioners may ostensibly attempt initially to insulate their magazines from children, or from the privacy of other persons, the Petitioners cannot and do not control such materials once such materials have left the bookstore. The magazines are then free to circulate, unimpeded by

reasonable regulation of any sort, intruding upon uninterested persons without respect to their privacy, their sensibilities, or their right to be free from such offensiveness.

Even more objectionable is the intrusion of such materials into the lives of children, contrary to the State's paramount interest in protecting the well-being of its youth, and without regard for the cruel damage done thereby to the moral and ethical development of children.

CONCLUSION

Section 2938 is a constitutionally appropriate method of dealing with obscene materials, establishing a judicially supervised, narrowly applicable procedure for circumscribing the dissemination of such materials. The section affords all requisite protection to non-obscene matter, postponing as it does all permanent injunctive restraint until after a finding of obscenity in an adversary, judicial proceeding, and not permitting even restraint pendente lite without an independent, judicial determination of obscenity. The statute further requires the holding of an adversary hearing and a decision thereafter within a closely circumscribed period of time. The application of § 2938 in this case bore none of the characteristics of the massive suppressions and seizures which this Court has properly condemned.

The publications comprising Exhibits 1 through 15 are those which describe and represent sexual matters with a candor beyond all customary limits. To the average person, applying contemporary community standards throughout the nation, the dominant theme of the exhibits, taken as a whole, appeals to a prurient interest in sex. The exhibits are patently offensive; they are utterly without redeeming social value. The Petitioners commercially exploited such materials solely on the basis of prurient appeal, their sole emphasis being upon the sexually provocative aspects thereof. The Petitioners' methods of distribution occurred without sufficient safeguards to assure that

their obscene publications would not reach children or the privacy of other persons.

The Respondent requests that the Court enter an order denying the Petitioners' petition for writ of certiorari to the Supreme Court of the State of Michigan.

Respectfully submitted,

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